UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

2016 MAR 11 P 2:

IN RE: DIRECTIVES PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	))))	Docket No. 105B(G) 07-01

THE UNITED STATES' RESPONSE TO THE COURT'S MARCH 14, 2016 ORDER

On March 14, 2016, the Court issued an order directing the Government to produce to the Court and to Yahoo! Inc. by April 11, 2016, declassified, redacted versions of the documents contained in Revised Appendix A. Consistent with this order, the Government hereby submits the enclosed version of these documents.

April 11, 2016

Respectfully submitted,

JOHN P. CARLIN
Assistant Attorney General
for National Security

STUART J. EVANS
Deputy Assistant Attorney General
National Security Division

/s/ Jonathan Fischbach
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Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Response to the Court's March 14, 2016 Order, and the enclosed documents, were served via hand delivery at the United States Foreign Intelligence Surveillance Court (FISC) on this 11th day of April, 2016, to the following addressees:

Marc J. Zwillinger
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ZwillGen PLLC
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Washington, DC 20036
(202) 706-5213

/s/ Jonathan Fischbach
Jonathan Fischbach

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

REPLY TO YAHOO INC.'S SUR-REPLY

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U.S. Department of Justice

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 4 January 2033~~

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INTRODUCTION (U)

Pursuant to the Court's Order of December 28, 2007, the United States of America, through the undersigned Department of Justice attorneys, submits this reply to the sur-reply filed by Yahoo Inc. ("Yahoo"). Yahoo's assertion that the Court should not enforce the directives because they violate the Fourth Amendment rights of its customers fails for two independent reasons, either of which is sufficient to support the Court's rejection of Yahoo's claims. Most fundamentally, as detailed in the Government's Memorandum in Support of the Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General, the directives authorize surveillance that is fully consistent with the Fourth Amendment. Additionally, however, as further developed below, Yahoo's objection fails because it may not vicariously assert the rights of its customers. The Court may dismiss Yahoo's constitutional objections to the directives on either ground without reaching the other. ~~(S)~~

ARGUMENT (U)

As the United States established in its Memorandum in Support of the Motion to Compel, Yahoo may not vicariously assert the Fourth Amendment rights of third parties as part of its challenge to the Government's Motion to Compel. Not only is this principle well-established in Supreme Court precedent,[1] it has been applied by the Supreme Court and appellate courts in precisely this situation: to preclude a business from asserting the Fourth Amendment rights of its customers. See California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (holding that a bank may not vicariously assert the Fourth Amendment rights of its customers); Ellwest Stereo Theatres,

[1] Alderman v. United States, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted."); Minnesota v. Carter, 525 U.S. 83, 88 (1998) ("The Fourth Amendment is a personal right that must be invoked by an individual."); Rakas v. Illinois, 439 U.S. 128, 140 (1978) (similar). (U)

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Inc. v. Wenner, 681 F.2d 1243, 1248 (9th Cir. 1982) (holding that theater lacks standing to invoke the Fourth Amendment claims of its patrons).[2] ~~(S)~~

Yahoo's attempt to circumvent this fundamental constitutional principle by pointing to section 1805B(g)'s requirement that the directives be "otherwise lawful" fails for three reasons. First and foremost, it turns on its head the basic principle discussed above that an entity, such as Yahoo, may not assert the Fourth Amendment rights of third parties. As the Court explained in Rakas, this principle defines the substantive contours of the Fourth Amendment for the person invoking its protection. Rakas v. Illinois, 439 U.S. 128, 139 (1978). Yahoo has not even contested that the directives infringe its Fourth Amendment rights. With respect to Yahoo, therefore, there is no dispute that the directives are "otherwise lawful," and that is all the statute requires.[3] ~~(S)~~

Second, Yahoo's contrary interpretation of "otherwise lawful" would compel the Court to engage in a roving review of any conceivable infirmity in a directive, without the presence of the persons whose rights may be at stake and without even a guarantee that any imagined infirmity is anything more than hypothetical. As the Supreme Court has long recognized, courts should avoid deciding "abstract questions of wide public significance" in circumstances in which "the claim is brought by someone other than one at whom the constitutional protection is aimed." Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (internal citations and quotations omitted). This

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[2] Yahoo's attempts to avoid the impact of the Shultz and Ellwest decisions by characterizing their holdings as dicta is meritless. See Sur-reply at 4 n.8. The Supreme Court's statement that the association and the bank could not "vicariously assert . . . Fourth Amendment claims on behalf of bank customers in general" can only be read as a holding as it dismissed one of the claims of the association and the bank on that ground. 416 U.S. at 69. The same principle was a cornerstone of the Ninth Circuit's holding in Ellwest. 681 F.2d at 1248. ~~(S)~~

[3] To the extent that Yahoo implies that unless it raises the Fourth Amendment claims of U.S. persons such claims could not be raised at all, Yahoo is incorrect. As the Supreme Court stated in Alderman, there "is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it." Alderman, 394 U.S. at 174. If the Government uses this information against a target of the surveillance in a criminal proceeding, the target will have the opportunity to challenge the legality of the surveillance. ~~(S)~~

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consideration is particularly applicable in the Fourth Amendment context because courts evaluating Fourth Amendment rights "are obliged to look to all the facts and circumstances of [the] case." South Dakota v. Opperman, 428 U.S. 364, 375 (1976). It is simply not possible for such facts and circumstances to be brought to the Court's attention where, as here, the persons whose rights may be implicated are not before the Court.[4] ~~(S)~~

Lastly, there is no indication in the text or elsewhere that Congress intended section 1805B(g) to require the Court to engage in such an inquiry at odds with the Supreme Court's instruction that "the Fourth Amendment is a personal right" and may only be asserted by the person who possesses it, Carter, 525 U.S. at 88. In the absence any such indication, the Court should not presume that Congress intended to require such a novel inquiry. ~~(S)~~

Yahoo additionally argues that the Supreme Court's limitations on who may assert Fourth Amendment rights is prudential, or judicially created, rather than constitutional in nature. Sur-reply at 4. This contention, however, is flatly inconsistent with Rakas. As the Court in that case explained, the principle that rights under the Fourth Amendment are personal and may not be vicariously asserted is not merely prophylactic, but a part of "substantive Fourth Amendment doctrine." Rakas, 439 U.S. at 139. This conclusion is a function of the text of the amendment itself. As the Supreme Court has written, the Fourth Amendment "protects persons against unreasonable searches of 'their persons [and] houses' and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual." Carter, 525 U.S. at 88 (emphasis added; brackets in original). ~~(S)~~

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4 For instance, for the Court to adjudicate whether the rights of an American abroad are violated by an interception it would need to know the facts surrounding the particular communication to determine whether the person had a reasonable expectation of privacy in it.

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It follows directly from this holding, of course, that this principle extends beyond the context of the exclusionary rule to define the scope of the Fourth Amendment's protections. Accordingly, Yahoo is similarly mistaken in its assertion that "the so-called doctrine of 'Fourth Amendment standing'" is inapplicable where "the limits of the exclusionary rule," are not at issue. Sur-reply at 3. In Shultz, the Supreme Court itself relied on Fourth Amendment standing principles outside the context of the exclusionary rule in rejecting the attempts of a bank and banker's association to avoid statutory reporting requirements based on the Fourth Amendment rights of customers. Shultz, 416 U.S. at 69 (holding that a bank and banker's association could not "vicariously assert ... Fourth Amendment claims on behalf of bank customers in general"). The courts of appeals, moreover, have routinely applied these same principles to dismiss civil suits filed pursuant to 42 U.S.C. § 1983 and Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).[5] Against this authority, Yahoo cites Heartland Acad. Cmty. Church v. Waddle, 427 F.3d 525, 532 (8th Cir. 2005). Sur-reply at 3. To the extent that Heartland Academy can be construed to limit this Fourth Amendment principle to the exclusionary rule, a proposition for which the court offered no support, it is squarely inconsistent with the Supreme Court's decision in Shultz, as well as the numerous decisions of the courts of appeals cited in note 5. ~~(S)~~

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[5] See, e.g., Hollingsworth v. Hill, 110 F.3d 733, 738 (10th Cir. 1997) (holding in section 1983 action that law enforcement officer's removal of mother's children did not violate her right to be free from unreasonable seizures since Fourth Amendment rights are personal rights that may not be vicariously asserted); Pleasant v. Lovell, 974 F.2d 1222, 1228-29 (10th Cir. 1992) ("To recover for a Fourth Amendment violation in a Bivens action plaintiffs must show that they personally had an expectation of privacy in the illegally seized items or the place illegally searched."); Shamaeizadeh v. Cunigan, 338 F.3d 535, 544 (6th Cir. 2003) (holding in section 1983 action that to assert a Fourth Amendment violation, plaintiff must show that the government's action in some way invaded his own reasonable expectation of privacy). (U)

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CONCLUSION (U)

For the reasons stated above and in its opening and reply briefs, the United States of America requests that this Court grant its motion for an order compelling Yahoo's compliance with the lawful directives of the Director of National Intelligence and Attorney General. ~~(S)~~

Respectfully submitted,

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Dated: January 4, 2008

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on January 4, 2008, true and correct copies of the United States of America's Reply to the Yahoo Inc.'s Sur-Reply and this Certificate of Service were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]

National Security Division
U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 4 January 2033~~

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

RESPONSE TO EX PARTE ORDER TO GOVERNMENT AND MOTION FOR LEAVE TO FILE CLASSIFIED APPENDIX FOR THE COURT'S EX PARTE AND IN CAMERA REVIEW (U)

The United States of America, through the undersigned Department of Justice attorney, hereby files this response to the Ex Parte Order to the Government dated February 15, 2008 ("Order"). In addition, the United States hereby moves this Court for leave to file the attached classified appendix pursuant to Section 105B(k) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act). The grounds for the motion are as follows: ~~(S)~~

1. On November 21, 2007, the government filed a motion pursuant to Section 105B(g) to compel Yahoo's compliance with [redacted] directives issued to Yahoo Inc. ("Yahoo") by the Director of National Intelligence and the Attorney General pursuant to Section 105B(e) of the Act. ~~(S)~~

~~Classified by:~~ Matthew G. Olsen, Deputy ~~Assistant Attorney~~ General, ~~NSD~~, DOJ
Reason: 1.4 ~~(c)~~
Declassify on 20 February 2033

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2. On December 11, 2007, the government submitted for the Court's ex parte and in camera review a classified appendix to the government's Memorandum in Support of the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General. The government styled this request as a motion for leave to file a classified appendix, although Section 105B(K) speaks in mandatory terms, providing that "the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information." On January 31, 2008, the Court granted the government's motion to file the classified appendix for the Court's ex parte and in camera review. ~~(S)~~

3. On February 15, 2008, the Court issued an Order requiring the government to address "[w]hether the classified appendix that was provided to the Court in December 2007 constitutes the complete and up-to-date set of certifications and supporting documents (to include affidavits, procedures concerning the location of targets, and minimizations procedures) that are applicable to the directives at issue in this proceeding." The answer to the Court's question is "no." The Order further required, in relevant part, as follows:

> If the answer to question number one is "no," the Government shall state what additional documents it believes are currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. The government shall file copies of any such documents with the Court concurrent with filing its brief. The government shall serve copies of this Order, its brief, and additional documents upon Yahoo, unless the

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> government moves this Court for leave to file its submission ex parte, either in whole or in part. If the government files such a motion with the Court, it shall serve a copy of its motion upon Yahoo. The government shall also serve a copy of this Order upon Yahoo, unless the government establishes good cause for not doing so within the submission it seeks to file ex parte.

The documents the government believes are currently in effect and applicable to the directives issued to Yahoo that are at issue in this proceeding are listed in the table of contents to the attached classified appendix (discussed below in paragraph 5). ~~(S)~~

4. This motion constitutes the government's request under Section 105B(k) that the Court review ex parte and in camera the attached classified appendix of materials.[1] These materials are the complete and up-to-date sets of certifications and supporting documents (including affidavits, procedures concerning the location of targets, and minimizations procedures) currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. These materials, some of which have been previously filed with the Court, contain classified information, including top secret and compartmented information. ~~(S)~~

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[1] The government recognizes that portions of the Protect America Act recently ceased to have effect. This fact does not affect this litigation or this motion, however, because Section 6(d) of the Protect America Act (which is not subject to the sunset contained in Section 6(c) of the Protect America Act) provides that "[a]uthorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration." Further, this Court's authority to enforce such directives under Section 105B(g), as well as the government's ability to file the attached classified appendix under Section 105B(k), are unaffected because Section 6(d) provides, in relevant part, that "[s]uch acquisitions shall be governed by the applicable provisions of such amendments." ~~(S)~~

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5. The attached classified appendix contains a table of contents identifying the documents therein. The government has included in the attached classified appendix the documents contained in the December 2007 appendix and has identified them as such in the table of contents. Thus, the attached classified appendix replaces in its entirety the December 2007 appendix. ~~(S)~~

6. On February 20, 2008, counsel for the United States informed counsel for Yahoo that the government would be requesting the Court's ex parte and in camera review of a classified appendix. Counsel for Yahoo requested copies of both the attached classified appendix and the December 2007 classified appendix, with redactions to the compartmented classified information, to determine whether Yahoo would oppose or agree to the relief sought in the government's request. Yahoo's request for a copy of the classified appendices is without merit. As discussed above, the Act gives the government the unqualified right to file documents in a proceeding to compel compliance with a directive for the Court's ex parte and in camera review. ~~(S)~~

7. In accordance with the Order, attached hereto is a certificate of service indicating that the government served upon Yahoo's counsel a copy of the Order and a copy of this response and motion without the attached classified appendix. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court review the attached classified appendix ex parte and in camera. A proposed Order is attached hereto. ~~(S)~~

[redacted]

Office of Intelligence Policy and Review
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

The United States, pursuant to Section 105B(g) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act), has moved this Court for an order compelling Yahoo Inc. to comply with [redacted] directives issued by the Director of National Intelligence and Attorney General pursuant to Section 105B(e) of the Act. Pursuant to Section 105B(k) of the Act, and in response to the Court's Ex Parte Order to the Government dated February 15, 2008, the United States now requests leave to file a classified appendix for ex parte and in camera review by the Court, and it appearing that such motion should be granted,

IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the motion of the United States is GRANTED, and it is

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FURTHER ORDERED that the classified appendix submitted by the government in the above-captioned matter is accepted for ex parte and in camera review by the Court.

Signed ________________________________ E.T.
Date Time

____
REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on February 20, 2008, true and correct copies of the Court's February 15, 2008 Ex Parte Order to the Government and the United States of America's Response to Ex Parte Order to Government and Motion for Leave to File Classified Appendix for the Court's Ex Parte and In Camera Review, without attached classified appendix, were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]

U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 20 February 2033~~

FSC 015

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[redacted]

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO! INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **Motion for Disclosure of Filings** **UNDER SEAL**

Yahoo! Inc. ("Yahoo!"), through its undersigned counsel, hereby moves this Court for disclosure of certain documents relied upon by the government in this matter. These documents include a decision of this Court that was cited in the government's February 15, 2008 filing, as well as the replacement Classified Appendix that the government now seeks to file in its February 20, 2008 motion.

<u>Opinion Cited in the Government's February 15, 2008 Supplemental Briefing</u>

1. On February 15, 2008, the government filed its Supplemental Brief on the Fourth Amendment ("Supplemental Brief"). In that brief, the government went well beyond answering the limited question posed by the Court in its February 6, 2008 Order, and instead used the opportunity to reargue the questions of whether a warrant is required for foreign intelligence surveillance,[1] and whether the proposed acquisitions are reasonable under the Fourth Amendment.[2]

2. The only significantly "new" argument contained in the Supplemental Brief is the argument in Section II(B) that the recent decision by this Court -- which purportedly upheld

[1] Supplemental Brief, Section II(A), pp. 4-5.
[2] *Id.*, Section II(B), pp.6-10

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certain targeting procedures used under the PAA -- demonstrates the reasonableness of the proposed acquisitions for purposes of Fourth Amendment analysis. *Id.* at 6, *citing* Mem. Op. and Order, [redacted] at 24, (Foreign Intel. Surv. Ct. Jan. 15, 2008)("Procedures Opinion."); *see id.* at 9, *citing* Procedures Opinion at 13, n.15 (addressing the Government's minimization procedures).[3]

3. Yahoo! has never seen the Procedures Opinion and is not in a position to respond (or to seek leave to respond) to the argument within Section II(B) without having reviewed a copy of the Procedures Opinion and determining its relevance to the issues in this matter.

4. Accordingly, on February 19, 2008, counsel for Yahoo! contacted counsel for the government to request to view a copy of the Procedures Opinion (properly redacted to the level of counsel's clearance). On February 20, 2008 the government denied Yahoo!'s request

5. Because the government's Supplemental Brief contains arguments beyond what was requested by the Court, and those arguments rely on an opinion of this Court not currently available to Yahoo!, the government's filing puts Yahoo! at a significant disadvantage. Accordingly, Yahoo! requests that it be provided access to a copy of the cited opinion (in a form appropriate to the clearance level for Yahoo!'s cleared in-house and outside counsel) so that Yahoo! can consider whether and how it should respond to the government's new argument.[4]

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[3] Additionally, the government's argument on the question of potential mootness due to the Feb. 15, 2008 sunset of the Protect America Act is also new. Yahoo! does not necessarily agree with the government's analysis, and is prepared to respond should the court request briefing on the issue.

[4] Alternatively, if the Court finds that the argument is not relevant and requires no response, the court can strike Section II (B) of the government's brief without requiring the government to disclose any additional materials to Yahoo!

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Other Classified Materials Filed With This Court

6. On Dec. 11, 2007, the government filed a two-page Motion for Leave to File a Classified Appendix, which motion was not then served on counsel for Yahoo!.

7. On Dec. 28, 2007, this Court issued an Order requiring the government to file a certificate of service for the two-page motion indicating that it was served on counsel for Yahoo!, or, in the alternative, to explain why the motion had not been served on Yahoo! and addressing whether it should be served. The Order also required that the government serve the December 28, 2007 Order on Yahoo! along with its responsive filing, or explain why it should not be required to do so.

8. In response, the government caused Yahoo! to be served with the Motion to File a Classified Appendix (without the classified Appendix) as well as the Dec. 28, 2007 Order on January 2, 2008.[5]

9. With no context to evaluate the proposed filing of the Classified Appendix other than a passing reference in the government's Dec. 11, 2007 Memorandum in Support of the Government's Motion to Compel Compliance,[6] Yahoo! did not file a response to the Motion. On January 31, 2008, the Court granted the government's Dec. 11, 2007 Motion for Leave to File Classified Appendix, noting that Yahoo! had not filed an objection.

10. On February 20, 2008, counsel for Yahoo! was informed by the government that this Court had issued another Ex Parte Order on February 15, 2008 pertaining to the filing of the Classified Appendix, which was not yet served upon Yahoo!. Counsel for Yahoo! was further informed that the government would be filing a response to that Ex Parte Order in the form of a motion for leave to file a replacement of the original Classified Appendix.

[5] Due to travel plans, counsel for Yahoo! received these papers on January 7, 2008.
[6] See *id.*, at 3, n.1.

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11. In response, counsel for Yahoo! requested that the government provide Yahoo! with access to a redacted copy of the replacement Appendix (in a form appropriate to the clearance level for Yahoo!'s cleared in-house and outside counsel) so that Yahoo! can respond to the motion and be in a position to understand how the filing changes, if at all, the Fourth Amendment issues at stake in the litigation. On February 20, 2008, the government denied Yahoo!'s request.

12. Absent any indication of the nature of the documents contained in the filing, and how they differ from the documents contained in the original filing, Yahoo! cannot meaningfully respond to the government's latest motion, nor can it determine how the latest filing changes, if at all, the Fourth Amendment analysis related to this matter.

Yahoo! respectfully requests that the Court grants its motion by ordering that Yahoo! be provided access to both the Procedures Opinion and the replacement Classified Appendix and under whatever procedures are deemed appropriate for the clearance levels of Yahoo!'s in-house and outside cleared counsel, as determined by the Department of Justice Litigation Security Officers.

DATED: February 20, 2008

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Attorneys for Yahoo!, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February 2008, I provided two true and correct copies of **Yahoo!'s Motion For Disclosure of Filings** (the "Motion") to [redacted] an alternate Court Security Officer, who has informed me that he will deliver one copy of the Motion to the Court for filing, and a second copy to the:

United States Department of Justice
National Security Division
950 Pennsylvania Ave., NW
Room 6150
Washington, D.C. 20530

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Attorneys for Yahoo!, Inc.

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ROUTING			
TO	NAME AND ADDRESS	DATE	INITIALS
1			
2			
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	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
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REMARKS

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FSC 021

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

GOVERNMENT'S RESPONSE
<u>TO THE COURT'S ORDER OF FEBRUARY 29, 2008</u> (U)

The United States of America, through the undersigned Department of Justice attorneys, respectfully submits this response to the questions the Court posed in its Order dated February 29, 2008 in the above-captioned matter. ~~(S)~~

INTRODUCTION (U)

The Protect America Act of 2007 ("the Protect America Act" or "the Act"), which amended the Foreign Intelligence Surveillance Act of 1978 ("FISA") empowered the Director of National Intelligence ("DNI") and the Attorney General jointly to "authorize the acquisition of foreign intelligence information" from persons reasonably believed to be outside of the United States for up to one year. 50 U.S.C. § 1805B(a). To ensure that

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 7 March 2033~~

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the acquisition targets persons outside the United States and is done in a manner that protects the privacy interests of U.S. persons, the Act predicates any such authorization on certain determinations that must be reduced to a written certification. The determinations include that statutorily required targeting and minimization procedures are in place. Id. § 1805B(a)(1). Acquisitions under the Act must be conducted "in accordance with the certification of the [DNI] and the Attorney General." Id. § 1805B(d). ~~(S)~~

A. [redacted] and the Government's Motion to Compel ~~(S)~~

Consistent with these provisions, the Attorney General and DNI authorized a broad range of acquisitions following the enactment of the Act and executed [redacted] separate certifications pertaining to surveillance of different sets of targets. See [redacted].[1] The certifications both verified that the procedures the Government would employ in its acquisitions satisfied the statutory requirements of the Protect

[1] The citations to "C.A. __" herein refer to the page number of the document in the Classified Appendix filed by the Government on February 20, 2008. ~~(S)~~

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America Act, and memorialized the respective authorizations for the acquisition of foreign intelligence information. See [redacted] As permitted by the Act, the Attorney General and the DNI subsequently issued directives to communications providers, including Yahoo!, Inc. ("Yahoo"), ordering their cooperation in the acquisition of foreign intelligence information covered by the authorizations. See [redacted] (directives). Each of those providers except Yahoo complied with the directives. ~~(TS//SI/NF)~~

On November 21, 2007, the Government filed a motion pursuant to section 1805B(g) to compel Yahoo's compliance with [redacted] directives issued to Yahoo[2] by the DNI and the Attorney General pursuant to section 1805B(e) of the Act.[3] The

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[2] Each directive to Yahoo stated, in relevant part, as follows:

"The Government will [redacted] "

[redacted] Emphasis in original). ~~(S)~~

[3] On [redacted] 2008, the Attorney General and DNI executed DNI/AG 105B Certification 08-01 [redacted]. That certification, as well as the procedures by which the Government determines that acquisition conducted pursuant to the authorization memorialized in that certification do not constitute electronic surveillance, were filed with this Court on [redacted] 2008. As noted in the notices of filing accompanying those documents, the Government is not at this time seeking to compel Yahoo's compliance in connection with such acquisition. Indeed, at this time, the Government has not served directives upon Yahoo in connection with this acquisition in consideration, in part, of this pending litigation. If the Government serves such directives upon Yahoo, the Government will file notices to that effect in this docket. ~~(TS//SI/NF)~~

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Government subsequently filed a classified appendix containing [redacted] and related materials, including affidavits, minimization procedures, and targeting procedures ("December 2007 Classified Appendix"). ~~(S)~~

B. First Amendment to [redacted] to Permit the CIA to Receive Raw Take ~~(TS//SI/NF)~~

On December 14, 2007, the first amendment to [redacted] was executed. See [redacted] Amendment 1. See C.A. 114-16. As explained in that amended certification and supporting documents, the Government modified existing National Security Agency ("NSA") minimization procedures and approved new minimization procedures for use by the Central Intelligence Agency ("CIA") in receiving unminimized communications ("raw take") acquired by NSA pursuant to the authorization contained in [redacted]. See C.A. 114-33. The amended certification verified that those modifications complied with the requirements of the Act. ~~(TS//SI/NF)~~

C. Amendments to [redacted] to Provide Procedures for the FBI [redacted] ~~(S)~~

The DNI and the Attorney General executed a second set of amendments to [redacted] The amendments designated the Federal Bureau of Investigation (FBI) [redacted] and permitted it to [redacted] See [redacted]

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[redacted] As explained in the amended certifications and supporting documents, the Government, adopted additional targeting and minimization procedures to govern the FBI's acquisition o[redacted] [redacted]minimization procedures, and adopted new minimization procedures to govern [redacted] See [redacted] The amended certifications affirmed that these procedures satisfied section 1805B(a) of the Protect America Act. ~~(TS//SI//NF)~~

D. Government's Classified Appendix and Yahoo's Access to Materials ~~(S)~~

On February 15, 2008, the Court issued an Order regarding the Government's classified appendix. See Ex Parte Order to the Government, Docket No. 105B(g): 07-01 (Feb. 15, 2008). In response, the Government, among other things, moved for leave to file an updated classified appendix pursuant to 50 U.S.C. § 1805B(k) ("February 2008 Classified Appendix"). The February 2008 Classified Appendix, filed on February 20, 2008, contains the complete and up-to-date sets of certifications and supporting documents (including affidavits, procedures concerning the location of targets, and minimizations procedures) applicable to the directives at issue in this proceeding and replaces in its entirety the December 2007 Classified Appendix.[4] See Response to Ex

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[4] The government takes full responsibility for its prior failure to file all the appropriate documents, including the amended certifications with the Court in this docket and will ensure that such problems do not occur in the future. ~~(S)~~

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Parte Order to Government and Motion for Leave to File Classified Appendix for the Court's Ex Parte and In Camera Review, at 4. On February 20, 2008, Yahoo filed a motion requesting that it be given access to this Court's January 15, 2008 opinion ("the Procedures Opinion") and the February 2008 Classified Appendix. The Court denied Yahoo's requests for access to the February 2008 Classified Appendix and the Procedures Opinion. See February 28, 2008 Order at 1, 2. ~~(S)~~

RESPONSES TO QUESTIONS IN THE COURT'S 29 FEBRUARY ORDER (U)

Question 1. **Does 50 U.S.C. § 1805B authorize the Government to amend certifications? If the answer is no, then what is the impact of the filing of such amendments on this litigation?** ~~(S)~~

Answer. (U)

Yes. The Attorney General and DNI may amend pursuant to section 1805B(a) the written certifications required by section 1805B(a). Indeed, the Attorney General and DNI must amend their written certifications before the Government may alter or add procedures that affect whether the statutory requirements for authorizations continue to be met. See 50 U.S.C. § 1805B(d). ~~(S)~~

The Protect America Act empowers the Attorney General and the DNI to "authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States," if they make certain determinations—"in the form of a written certification," either at the time or promptly thereafter in an emergency— that the statutory requirements are met with respect to: (a)

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the Government's targeting procedures; (b) the nature of the acquisition (i.e. that it does not constitute electronic surveillance); (c) the need for third-party assistance; (d) the purpose of the acquisition; and (e) the Government's minimization procedures. See 50 U.S.C. § 1805B(a). (U)

Under the written certification requirement, if the Government wishes to supplement or revise any procedures underlying the determinations contained in the written certification—for example, as here, by supplementing the minimization procedures or adding additional targeting procedures—while continuing to collect foreign intelligence information pursuant to the same authorization, it must amend the existing section 1805B(a) written certification to reflect the determination that the statutory requirements of the Protect America Act continue to be met after the proposed modifications. To this end, the Act expressly provides that acquisitions under the Protect America Act "may be conducted only in accordance with the certification." Id. at § 1805B(d). An acquisition is not, of course, "in accordance with [a] certification" if it is conducted using procedures different from those that formed the basis for the determinations contained in the section 1805B(a) written certification in the first place. Thus, anytime the Government wishes to modify the procedures that it uses in an acquisition, the Attorney General and DNI are generally required to update the certification to reflect the determination that the revised procedures continue to satisfy the requirements of section 1805B(a)(1)-(5). ~~(S)~~

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While the Protect America Act does not expressly address the method the Government may use to amend its section 105B(a) written certifications, neither its text nor the purpose of its certification requirement supports a construction that would bar the Attorney General and DNI from accomplishing this task by amending a certification. The requirement to certify a fact naturally includes the authority to revise or amend that certification in response to changes in underlying facts. See Federal Labor Relations Auth. v. Dept. of Treasury, 884 F.2d 1446, 1454 (D.C. Cir. 1989) (recognizing that an "agency has the authority to amend [its] regulations," even in the absence of specific statutory authority to do so); Bellville Min. Co. v. United States, 999 F.2d 989, 997 (D.C. Cir. 1993) ("Even where there is no express reconsideration authority for an agency . . . the general rule is that an agency has inherent authority to reconsider its decision . . ."). Even were there residual doubt on this question, however, it should be decided in favor of the Government's interpretation of this statutory framework in the realm of foreign affairs. See Springfield Indus. Corp. v. United States, 842 F.2d 1284, 1286 (Fed. Cir. 1988) (explaining that the case for Chevron deference is "particularly strong whe[re], as here, not only is there an interpretation of the statue by the officers or agency charged with its administration, but the agency action is in the foreign affairs"); Population Inst. v. McPherson, 797 F.2d 1062, 1070 (D.C. Cir. 1986) (recognizing that Chevron deference is stronger in light of the "special deference that should be accorded the executive in those activities that impinge on foreign affairs"). (U)

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That the Government may amend its existing section 105B(a) certifications finds further support in the practice of this Court when dealing with FISA orders issued under title I and title III of FISA. Similar to the certification requirement of the Protect America Act, FISA provides that the Court must enter an order authorizing electronic surveillance or physical search if it finds that the authorized activity would comply with specific statutory criteria, see 50 U.S.C. 1805(a); id. § 1824(a). Also like the Protect America Act, FISA does not specifically address whether the Court may amend its orders issued under section 1805(a) to permit the Government to modify the procedures applicable to the authorized activity. Yet the Court has amended pre-existing primary orders in individual cases to permit the Government to supplement or modify the minimization procedures approved for use under the order without requiring the Government to submit a new application or issuing a new order. See, e.g. [redacted] Various Docket Nos., Orders Attached to Report to the Court and Motion for Particularized Minimization Procedures (report filed Nov. 9, 2006) (granting the Government's motion to amend primary orders in various dockets to permit the dissemination of certain information pursuant to particularized minimization procedures). ~~(S)~~

Of particular relevance here, the Court has in the past issued an order amending numerous to permit broader dissemination of information within the Government pursuant to supplemental minimization procedures. See In re Electronic Surveillance

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and Physical Search of International Terrorist Groups, Their Agents, and Related Targets, Order at 1-2, Docket No. 02-431 (July 22, 2002) ("Raw Take Order"). In the Raw Take Order, the Court specifically approved the Government's motion to "use the aforementioned supplementary minimization procedures in *all* of the captioned electronic surveillances and physical searches already approved since January 1, 2001, as described in the Government's motion," while leaving intact unrelated portions of the orders. *Id.* at 4 (emphasis added). See, e.g., [redacted] Amendment to Primary Order and Warrant Authorizing Electronic Surveillance and Physical Search, at 3 ("[A]ll other provisions of the Court's Order and Warrant issued in the above-captioned docket number . . . will remain in effect, including the time and date of the expiration of the surveillance and search authority.").[5] ~~(S)~~

Amendments to primary FISA orders to employ supplementary or modified minimization procedures issued under sections 1805(a) and 1824(a) are analogous to the amendments that the Attorney General and the DNI have made to their original section 1805B(a) certifications here. Just as the Court modified its earlier FISA orders to permit broader dissemination pursuant to supplementary minimization procedures, the

[5] This Court has also modified orders not covered by the Raw Take Motion in order to permit the use of such supplementary minimization procedures. See, e.g. [redacted] Amendment to Primary Order and Warrant Authorizing Electronic Surveillance and Physical Search, at 2 (ordering that "the primary Order and Warrant issued by this Court . . . is amended nunc pro tunc by adding" the procedures approved under the Raw Take Order) (Foreign Intel. Surv. Ct. Oct. 1, 2007). This further establishes that an order authorizing activities under FISA may be amended to alter the procedures underlying an order without undermining the order itself or effectively creating a new order. The same holds true for amendments to the certifications in this case. ~~(S)~~

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Government amended its prior certifications under the Protect America Act to permit broader dissemination under similar minimization procedures and to allow the FBI to acquire certain information using minimization procedures and additional targeting procedures. In both cases, the authority under section 1805B to make the necessary determinations as an initial matter also provides the authority to amend such determinations in response to a change in the procedures the Government uses in its acquisition of foreign intelligence information. ~~(S)~~

Construing the Act to preclude the Government from amending its existing section 1805B(a) certifications and remaking the determinations would simply require the Government to take the extra step of crafting a new certifications. Nothing in the Protect America Act remotely suggests that the Government is locked into the precise procedures that it used at the time the Attorney General and DNI first authorize acquisitions under the Act.[6] To the contrary, under section 1805B, the Attorney General

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[6] In fact, the Act clearly contemplates that, in certain circumstances, the Court may compel the Government to modify the procedures that it uses in acquisitions authorized under the Act. In particular, if the Court disapproves the Government's procedures for determining that targets of surveillance are reasonably believed to be outside of the United States, the Act requires the Court to "issue an order directing the Government to submit new procedures within 30 days or cease acquisitions under [the Act] that are implicated by the court's order." See 50 U.S.C. § 1805C(c) (emphasis added). (U)

Similarly, the Court has advised the Government to amend certain procedures. During a December 12, 2007 hearing concerning targeting procedures, Judge Kollar-Kotelly encouraged the Government to amend either the NSA targeting procedures or the NSA minimization procedures to address [redacted], [redacted]. See Hrg. Tr. at 23 [redacted] id. at 25 [redacted] In part in response to the Court's concerns, the Government amended the existing certifications. To hold that the Government does

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and DNI could unquestionably issue a "new" certification verifying that the revised procedures the Government wishes to implement are consistent with statutory requirements, and thereby permit the Government to conduct its acquisition using those procedures. 50 U.S.C. § 1805B(a). There is no reason to interpret the Protect America Act to require the Government to take such a formalistic step, however, when the language of the Act could reasonably be interpreted to permit the Government to provide the same assurances by amending the existing certification to account for revised procedures. ~~(S)~~

<u>Question 2.</u> **Assuming the Government can amend a certification under 50 U.S.C. § 1805b, is the issuance of an amended certification tantamount to the issuance of a new certification?** ~~(S)~~

<u>Answer.</u> (U)

No. The amendment of a certification is not in general tantamount to the issuance of a new section 1805B(a) certification. ~~(S)~~

The changes in procedures that prompted the Attorney General and DNI to amend [redacted] did not make any changes that would require the issuance of a new section 1805B(a) certification. To the contrary, the changes in procedures addressed by the amendments effectuated two internal modifications regarding the procedures for conducting acquisitions and handling foreign intelligence

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not have the ability to amend certifications in order to make changes to the procedures that underlie the certifications would thus run counter to the statutory language, as well as direction of this Court to make just such modifications. ~~(TS//SI//NF)~~

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information consistent with the Protect Act America Act: (1) they permit the NSA to disseminate "raw take" to CIA, and provide the minimization procedures CIA will use when processing such information; and (2) they provide procedures by which the FBI may obtain [redacted] the acquisition of which was already authorized. These are precisely the sorts of procedural modifications that are appropriately addressed by an amendment to the existing section 1805B(a) certification. Thus, while there may be instances in which the Government seeks to amend a section 1805B(a) certification in ways that are so substantial that the amendment could be said to be "tantamount" to issuing a new certification, the relatively minor modifications that prompted the amendments here do not approach the sorts of changes that would have such an effect. ~~(S)~~

Significantly, the amendments to the existing certifications do not purport to replace those certifications. Rather, the amendments build upon the existing certifications to take account of the additional procedures that the Government intended to use. For example, with respect to the amendment to Certification [redacted] permitting dissemination of raw take to the CIA, the underlying affidavits make clear that the Government was not in any material way modifying the underlying procedures—including the NSA targeting procedures—that had been determined to meet the statutory requirements in the original certification. Se[redacted]. The affidavits simply provided that the NSA's minimization procedures would be

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modified to permit dissemination of unminimized communications to the CIA, and that the CIA would process such information using minimization procedures that the Attorney General and DNI have approved as consistent with section 101(h) of FISA, 50 U.S.C. § 1801(h). See C.A. 116. Accordingly, the only determination that the DNI and Attorney General made, and could make, in executing the amendments to the certification was that the amended minimization procedures proposed by NSA and the additional minimization procedures used by the CIA themselves met the definition of minimization procedures. The previous determinations of the DNI and Attorney General under the original certification based on the procedures described in the supporting affidavits remain intact. Indeed, because the amendments standing alone are insufficient to constitute the full set of determinations required by the Protect America Act, the original certification remains essential to ensure that statutory requirements are met. ~~(S)~~

The same is true of the second set of amendments permitting the FBI to obtain [redacted] and disseminate them within the Government. The affidavits accompanying those amendments made clear that the only material changes being adopted were the targeting and minimization procedures to be used by the FBI [redacted], see [redacted] —the acquisition of which is authorized by both the existing authorizations and the directives issued to Yahoo. See

[redacted]

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[redacted] ~~(S)~~

Moreover, even the additional targeting and minimization procedures addressed by the amendment represented relatively minor changes to the procedures already determined to meet the statutory requirements as reflected in the section 1805B(a) certification. FBI's targeting procedures were to be applied [redacted] As a result, the FBI's targeting procedures serve as [redacted]. Because the original certification reflected the determination that the NSA targeting procedures satisfied the Protect America Act standing alone, it necessarily follows that [redacted] ~~(TS//SI/NF)~~.

Similarly, when the FBI disseminates the "raw take" of its acquisition to NSA or CIA, those agencies would apply minimization procedures that are substantially similar to the procedures the Attorney General and DNI had already determined satisfy the statutory requirements in a previous certification. See [redacted] Accordingly,

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the FBI amendments to the certifications simply bolstered the original certification by verifying that the FBI's supplementary minimization procedures also met the requirements of the Protect America Act. See [redacted] ~~(TS//SI/NF)~~

In sum, because the modifications addressed in the amended certifications are wholly procedural in nature and do not relate to the Government's core collection authority, those additional certifications constitute amendments to the original certification—and are not tantamount to "new certifications." ~~(TS//SI/NF)~~

Even if the Court elects to treat the amended certifications as effectively new certifications, however, that determination would have little impact on this litigation. For the reasons explained in response to Question 3 below, so long as the authorization for the acquisition of foreign intelligence information is not changed or modified in a substantive way (e.g., by extending its length), the directive issued pursuant to the authorization is valid and requires the provision of assistance by the person receiving the directive—whether or not the authorization is supported by an amended certification or a new certification. ~~(S)~~

<u>Question 3.</u> **Can the Government rely on a pre-existing directive if it amends a certification, or does it need to issue a new directive pursuant to the amended certification? Does the answer depend upon the nature of the amendment?** ~~(S)~~

<u>Answer.</u> (U)

Yes. For the reasons explained below, the Attorney General and DNI need not issue a new directive when they amend a certification to account for new procedures

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the Government wishes to implement. This is true even if they issue a new section 1805B(a) certification supporting an existing authorization. (U)

The Protect America Act distinguishes between the Attorney General's and DNI's authorization of acquisition of foreign intelligence information and the written certification that must reflect the determinations required by the Act. While the certification must reflect determinations that the acquisition will comply with statutory criteria, the acquisition itself occurs pursuant to the authorization of the Attorney General and DNI, not pursuant to their certification. Section 1805B(a) makes this clear by, for example, allowing the authorization of acquisitions without making the determinations in a written certification where "immediate action is required and time does not permit the preparation of a certification." 50 U.S.C. § 1805B(a). In addition, the Act provides that "authorizations for the acquisition of foreign intelligence information pursuant to the [Protect America Act] ... and directives issued pursuant to such authorizations" remain in effect following the sunset of the Act. Id. § 1805C(d). The sunset provision's reference to authorizations and not certifications confirms that the acquisition takes place pursuant to an authorization, not a certification. Finally, the certifications required by the Act require limited determinations, which are not themselves adequate to describe the authorization granted. (U)

Because directives are issued pursuant to authorizations by the Attorney General and the DNI, not certifications, the amendment of a section 1805B(a) certification—or

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even the issuance of a new section 1805B(a) certification related to an ongoing authorization—does not generally require the issuance of a new directive to providers. See 50 U.S.C. § 1805B(e) ("With respect to an authorization of an acquisition under [50 U.S.C. § 1805B], the DNI and the Attorney General may direct a person to immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition . . .") (emphases added); id. § 1805C(d) (referring to "directives issued pursuant to such authorizations"). A new directive is required only if there is a new authorization for the acquisition of foreign intelligence information, for example where the Government makes changes to its acquisition in way that expands the underlying authorization, e.g., by extending the time for which the authorization would be in effect. The Government thus can rely upon a pre-existing directive if it amends a certification. (U)

Consistent with this statutory framework, the Government's directives to Yahoo were issued pursuant to an authorization under 50 U.S.C. § 1805B(a) and not the particular section 1805B(a) certifications reflecting the statutorily required determinations. To be sure, the directives refer to a specific certification and note that the execution of the certification "thereby authorize[ed] the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States." See [redacted] (Yahoo directives). But this merely reflects that, with respect to each of the directives received by Yahoo, the authorization for the

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acquisition of foreign intelligence information is recorded in the same document as the certification of the determinations required by section 1805B(a)(1)-(5). See 50 U.S.C. § 1805B(a). It does not, and could not, change the statutory requirement that directives be issued pursuant to authorizations, not pursuant to a certified document recording the five required statutorily required determinations. ~~(S)~~

In this case, as discussed in response to Question 2, none of the changes to the procedures the Government uses in its acquisitions altered the acquisition (e.g., by extending its duration). Accordingly, by any measure of what changes would constitute a new "authorization" under the Act, the changes here fall short. Accordingly, the Government's acquisition continues to operate under the original authorizations, and no new directive was required to be issued. ~~(S)~~

That the procedural modifications made pursuant to the amendments do not require the Government to issue an additional directive is further supported by the practice of this Court with respect to traditional FISA orders, as discussed above. When the Court has amended primary FISA orders, e.g., to permit the Government to employ revised minimization procedures with respect to a particular collection, it has not issued new secondary orders to the provider, directing their compliance with the revised primary order. Rather, as here, the Court has relied on its original secondary orders as sufficient to require compliance with the primary order as amended. See, e.g., In re

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[redacted]

[redacted] ~~(S)~~

<u>Question 4.</u> If the Government can amend certifications without issuing new directives, then how can the recipient of a directive obtain meaningful judicial review of the legality of the directive? ~~(S)~~

<u>Answer.</u> (U)

The fact that the Government may amend certifications or even issue new certifications without issuing new directives does not affect the ability of a provider to obtain meaningful judicial review of the legality of a directive for two reasons. ~~(S)~~

First, at the time a provider must decide whether to comply with a directive or seek review of a directive via a petition to this Court, the provider does not have access to the authorization, the certification that render the acquisition lawful under the Protect America Act, or any of the underlying materials supporting the certifications. The only information that a provider has received is a general directive requiring it to provide the Government with the specified assistance. <u>See</u>, <u>e.g.</u>, C.A. 30 (directive issued to Yahoo); 50 U.S.C. § 1805B(e). Thus, at the point at which a provider must decide whether to comply with a directive or to challenge it, the provider's decision necessarily turns on the <u>fact</u> of receiving a directive, not on the specifics of the authorization, the underlying certification, or the procedures or affidavit supporting the certification. Therefore, Government's authority to revise the procedures it uses in

acquiring foreign intelligence information has no affect on the ability of a provider to seek judicial review of a directive. ~~(S)~~

Second, in the event that a provider challenges a directive or the Government seeks to compel a provider to comply with a directive, the Government's authority to modify its procedures in the course of its acquisition similarly does not affect the provider's ability to obtain meaningful judicial review. While litigation is pending before this Court regarding the legality of directives under the Protect America Act, the Government has an obligation to alert this Court to any material change that may affect the Court's decision. This obligation extends to any material changes made to an authorization, an accompanying certification, or the procedures the Government uses in the course of its acquisition of foreign intelligence information. The Government's obligations to keep the Court informed of changes that may inform its analysis are amplified where as here the materials at issue are filed ex parte. See ABA Model Rules, Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). The Government further has the duty to notify the Court anytime that it amends a materially certification in response to changes in the procedures it uses in its acquisition. See 50 U.S.C. § 1805B(c) (providing that the "Attorney General shall transmit as soon as practicable ... to the court ... a copy of a certification made under subsection (a)"); see also Foreign Intelligence Surveillance

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Court, Rules of Procedure, Rule 10(b) (effective February 17, 2006) ("If the Government discovers that a submission to the Court contained a misstatement or omission of material fact, the Government, in writing, must immediate inform the Judge to whom the submission was made . . . "). This obligation would continue, of course, if this Court were to compel a provider to comply with a directive for the entire period covered by the directive.[7] ~~(S)~~

In light of these obligations to keep the Court apprised of any material changes in the procedures the Government uses in its acquisition, the Government's ability to modify those procedures—and corresponding authority to amend the certifications related to acquisitions—does not deprive a provider of meaningful judicial review. The Court would have the opportunity to consider how any changes to the Government's procedures affect its analysis, along with the authority to take any steps that it believes appropriate to address those changes, including ordering additional briefing or revoking any existing orders. This authority ensures that any provider choosing to seek review of a directive (or forcing the Government to compel its compliance) will be able to obtain meaningful judicial review of the legality of the directive. ~~(S)~~

[7] See ABA Model Rules, Rule 3.3(c); District of Columbia Rules, Rule 3.3(c) & cmt. 12; cf. Board of License Comm'rs of the Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985) (per curiam) (dismissing a case as moot but noting that "[i]t is appropriate to remind counsel that they have 'a continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation.") (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). (U)

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Last, it is worth noting that requiring the Government to issue new directives to a provider each time it made amendments to a certification or the underlying materials would not enhance the provider's access to judicial review. In almost all circumstances, the new directives issued to the provider would be substantively identical to the directives the provider had previously received. The similarity of directives, even relating to different authorizations, is apparent in the [redacted] directives issued to Yahoo. The only differences between the [redacted] directives are the name of the certification (e.g. [redacted]), the dates on which the certification was executed, and the date the directives expire. [redacted]. It is difficult to see how receiving multiple, identical directives would affect a provider's ability to challenge the legality of the Government's acquisition. Moreover, such a regime risks the disclosure of classified information to the provider under circumstances that would not warrant the disclosure. ~~(S)~~

<u>Question 5.</u> **Assuming the Government can amend a certification under certain circumstances, can it do so for the purpose of instituting new procedures for determining that the acquisition concerns persons reasonably believed to be located outside the United States or for the purpose of changing the underlying minimization procedures? ~~(S)~~**

<u>Answer.</u> (U)

Yes. As explained in detail in the Government's responses to questions 1 and 2 above, the Government may amend certifications to institute new targeting procedures

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or minimization procedures or to change or supplement existing procedures. This authority, which derives from the Government's statutory obligation to authorize acquisitions based on the determinations required by statute and reduced to written certifications, is similar to this Court's authority to amend pre-existing orders to supplement the minimization procedure approved for use under that pre-existing order or to make other modifications. See, e.g. [redacted]

[redacted] ~~(TS//SI//NF)~~

Question 6. **Can the Government submit new procedures to this Court for review under 50 U.S.C. § 1805c more than 120 days after the effective date of the Protect America Act, but prior to the annual update envisioned by the statute?** ~~(S)~~

Answer. (U)

Yes. Where the Government authorizes new acquisitions of foreign intelligence information after 120 days and certifies that the requirements of the Protect America Act are met, the plain language of the Act requires the Government to submit new procedures to the Court. See 50 U.S.C. § 1805B(c). Thus, section 1805c must be read consistent with this statutory requirement to permit the Government to submit new procedures to this Court more than 120 days after the Protect America Act became effective. (U)

Under 50 U.S.C. § 1805B, the Attorney General and the DNI could authorize the acquisition of foreign intelligence information at any time from August 5, 2007, the

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effective date of the Protect America Act, through February 16, 2008, 195 days after the effective date of the Protect America Act.[8] See 50 U.S.C. § 1805B(a). For each acquisition under section 1805B, the Government is required to submit the relevant procedures to the Court for review under section 1805C. 50 U.S.C. § 1805B(a)(1) (requiring the Attorney General and DNI to determine, inter alia, that "there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to section 105C of this Act") (emphasis added). Because the Government is required to certify that its targeting procedures for each acquisition it authorizes—including those initiated after the 120-day period—will be reviewed under section 1805C, the statute specifically envisions that if such acquisitions are authorized after the initial 180-day period has passed, but before the annual update and submission required by 50 U.S.C. § 1805C(a), the Court must accept targeting procedures more than 120 days after the Act's enactment. See 50 U.S.C. § 1805B(a)(1).[9] (U)

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[8] Congress passed a fifteen-day extension of the PAA, so the PAA did not actually sunset until midnight on February 16, 2008. (U)

[9] The alternative interpretation—prohibiting the Government from filing new or amended procedures after 120 days—would create an anomalous situation in which the Attorney General and the DNI could authorize acquisitions under section 1805B but could not submit the relevant procedures to this Court for review under section 1805C. Such an interpretation would be contrary to the evident intent of Congress to ensure oversight of each such acquisition through this Court's review of the relevant

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In addition, the Protect America Act expressly requires this Court to order the Government to file new targeting procedures if this Court deems those procedures insufficient in the course of its review under under section 1805C. See 50 U.S.C. § 1805C(c) (requiring this Court to "issue an order directing the Government to submit new procedures within 30 days or cease any acquisitions under section 105B that are implicated by the court's order" if it finds the Government's determination regarding its targeting procedures to be clearly erroneous). Because the Court's review is to be completed 180 days after the enactment of the statute (February 1, 2008), see 50 U.S.C. § 1805C(b), such an order could require the filing of such procedures after the initial 120 day window. Thus, the submission of new procedures to this Court after December 3, 2007, is consistent with, and under certain circumstances, required by the plain language of the Protect America Act. (U)

Section 1805C does not create any ambiguity with respect to the Government's ability to submit procedures to this Court after December 3, 2007. Although that section imposes requirements on the Government with respect to the initial submission of targeting procedures, it does not bar the Government from submitting procedures for review after December 3, 2007. This construction of section 1805C makes the submission of targeting procedures to this Court for its review consistent with the

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procedures. See 1805B(a)(1) (requiring that the Government's determinations regarding targeting procedures for each acquisition authorized pursuant to the Protect America Act "will be subject to review of the Court pursuant to section 105C"). (U)

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acquisition authority granted in section 1805B—which permits the authorization of acquisitions beyond the initial 120-day window and requires the submission of procedures for such acquisitions—and does not render the 120-day requirement in section 1805C superfluous. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (court must interpret statute "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal quotations and citations omitted). (U)

Finally, interpreting section 1805C to bar the Government from submitting any procedures after December 3, 2007, would preclude the Government from submitting amended procedures to the Court whenever the Government discovered a need to improve its targeting procedures or when this Court recommends an amendment to such procedures in the course of its review under section 1805C. Nothing in the Act supports this result. As discussed above in response to Question 1, the Act affirmatively contemplates that the Government may alter certain procedures in the course of an acquisition. Indeed, the amendments made to the certifications underlying the directives at issue here were just such amendments. First, the Government determined that it needed supplementary procedures to disseminate raw take to the CIA under Certification [redacted] and to allow the FBI to [redacted] Second, the Court suggested, at a December 12, 2007, hearing on the Government's targeting procedures (130 days after the effective date of the PAA), that the Government amend

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the targeting or minimization procedures underlying the directives at issue in this litigation. See Dec. 12, 2007 Hrg. Tr. at 22-23. These changes were perfectly consistent with the Protect America Act; there is, for the reasons stated above, no basis for construing the Act to preclude the Court from reviewing them. ~~(TS//SI//NF)~~

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FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO! INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Dkt. No. 105B(G) 07-01

Yahoo! Inc.'s Supplemental Briefing on Protect America Act Statutory Issues

UNDER SEAL

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March 19, 2008

INTRODUCTION

On March 5, 2008, this court ordered Yahoo! to respond to six specific questions related to the government's attempt to amend the certifications on which the directives at issue in this litigation were based. Because some of the questions are inextricably related, Yahoo! has grouped the court's questions into three sections addressing: (1) the effect of the new certifications; (2) the interplay between the new certifications and the old directives; and (3) the effect of the government's updates to the procedures for determining that targets of the surveillance are located outside the United States. In addition, section four of this memorandum addresses the effect of the February 15, 2008 expiration of the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) ("PAA") and how its expiration mandates that the Court deny the government's motion to compel.

As described below, given that the certifications of the Attorney General and the Director of National Intelligence provide the sole legal basis upon which any foreign intelligence acquisitions can be conducted under the PAA, any attempts to amend the certifications that purport to change the way in which the acquisitions shall be conducted must be treated as new certifications. Such new certifications require the issuance of new directives because the authority under which the prior directives have been issued – the original certifications – are no longer valid and in force. Given that no new directives were issued to Yahoo! while the PAA was still in effect, the government's motion to compel must be denied. Finally, due to the expiration of the PAA, this court no longer has jurisdiction to resolve the government's motion to compel because Congress provided no explicit savings clause that would allow this court to retain jurisdiction over disputes related to directives that were not implemented prior to the expiration of the PAA.

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ARGUMENT

Before it expired, the PAA permitted the government to authorize the acquisition of "foreign intelligence information concerning persons reasonably believed to be outside the United States." Congress' grant of authority, however, was subject to specific statutory requirements.[1] Before acquiring communications under the authority of the PAA, the Director of National Intelligence and the Attorney General must first determine that five key statements are accurate:

> (1) [t]here are reasonable procedures are in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to the review of the Court pursuant to section 1805c of this Title ("Targeting Procedures");
>
> (2) the acquisition does not constitute electronic surveillance;
>
> (3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications provider, [or other person] who has access to [such] communications . . .;
>
> (4) a significant purpose of the acquisition is to obtain foreign intelligence information; and
>
> (5) the minimization procedures to be used with respect to such acquisition meet the definition of minimization procedures under section 1801(h) of this title.

See 50 U.S.C. § 1805b(a)(1)-(5).

These required findings limit the executive branch's authority under the PAA and are statutory (although not constitutionally sufficient) prerequisites for the government's acquisition of private communications with no prior judicial authorization. Congress did not set forth these findings as mere suggestions for the government to consider, but instead required the

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[1] As Yahoo! has argued in its earlier submissions to this Court, the certification requirements imposed in 50 U.S.C. § 1805b (2008) are inadequate to protect the rights of United States persons under the Fourth Amendment because they permit the government to acquire the contents of communications in which United States persons have a reasonable expectation of privacy without prior authorization from a neutral and detached magistrate. Nothing in this memorandum should be read to undermine that position.

Government's determination regarding these factors to be *certified* in writing by both the Director of National Intelligence and the Attorney General. 18 U.S.C. § 1805b(a). Moreover, Congress required that the findings be supported by evidence in the form of affidavits from high ranking government officials — Presidential appointees subject to Senate confirmation or the Head of any Intelligence Committee Agency. *Id.* To ensure the accuracy of these affidavits, and thus the legitimacy of the asserted basis for surveillance, Congress required the contents of the affidavits supporting the certification to be verified under oath. *Id.* Finally, Congress required the certifications to be filed, under seal, with the FISC so that the certifications could be scrutinized in the event that a directive based on one of the certifications is challenged. 18 U.S.C. §1805b(c).

Given these requirements, the certification process set forth in § 1805(b) is not a mere formality. Under the framework for the PAA, these certifications provide the authority for conducting acquisitions that may involve the private communications of U.S. persons and are comparable *in effect* to a court order authorizing surveillance under Title III or FISA. Although the PAA does not sufficiently protect the Fourth Amendment rights of United States persons against warrantless interception of their private communications, it was designed to impose some limits on the executive branch. Indeed, the process is the *only* safeguard provided under the PAA to protect United States persons against improper surveillance.

I. NEW CERTIFICATIONS WERE FILED IN [redacted]

Any attempt by the government to materially amend the certifications that provided the authority for issuing the [redacted] directives served on Yahoo! in this matter should be treated as if the government were filing new certifications. In this case, the directives that were served on Yahoo! in [redacted] specifically reference certifications that were filed in

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[redacted][2] The government's statutory authority to conduct the acquisitions for which it seeks Yahoo!'s assistance is predicated entirely upon the findings contained in those certifications and the sworn affidavits and Targeting and Minimization Procedures that are required elements of the certifications. Months after this litigation was pending, the Court apparently recognized that the government had filed, in other dockets, documents that purported to amend the specific certifications at issue here and asked the government whether it intended those amendments to apply to the certifications that provided the authority for the directives issued to Yahoo!.[3] In response, the government clarified that it intended the more recent documents to apply here and filed a new classified appendix in this docket containing new procedures and affidavits, thus attempting to modify the existing certifications.[4]

This exchange between the Court and the government, as well as the questions posed by the Court, suggests that the new certifications contain changes to either the Targeting Procedures or the Minimization Procedures or both.[5] With regard to the government's effort to inject the new certifications into this proceeding, the Court posed the following three questions:

> 1. Does 50 U.S.C. § 1805b authorize the government to amend certifications? If the answer is no, then what is the impact of the filing of such amendments on this litigation?
>
> 2. Assuming the government can amend a certification under 50 U.S.C. § 1805b, is the issuance of an amended certification tantamount to the issuance of a new certification?

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[2] *See* Ex. A to United States Mot. to Compel Compliance with Directives of the Dir. of Nat'l Intelligence and Attorney General.

[3] *See* Ex Parte Order to Gov't., dated February 15, 2007.

[4] *See* Resp. to Ex Parte Order to Gov't and Mot. for Leave to File Classified App., ¶¶ 3 – 5.

[5] Yahoo! has not been provided access to the original certifications, nor the new certifications, despite its request to review them, and thus has no first-hand knowledge as to how they differ. *See* Yahoo!'s Mot. for Disclosure of Filings, dated Feb. 25, 2008. This Court's Feb. 15 Order makes clear, however, that the new certifications rely on procedures and affidavits that were not originally included in the [redacted] certifications. *See* Ex Parte Order to Gov't, dated Feb. 15, 2007.

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5. Assuming the government can amend a certification under certain circumstances, can it do so for the purpose of instituting new procedures for determining that the acquisition concerns persons reasonably believed to be located outside the United States or for the purpose of changing the underlying minimization procedures?

All three of these questions essentially require the same answer. Although the government may amend a certification, any material change to the substance of a certification submitted pursuant to § 1805b(a) must be treated as a new certification. When a certification is amended in a material way, the government is representing that the prior certification no longer accurately describes the manner in which the acquisition will be conducted. As a result, a directive based on the prior certification lacks statutory authority.

No express provision in the PAA authorizes the government to amend a certification. Nevertheless, Yahoo! does not dispute that the government is permitted to file amendments that are necessary to correct certifications that contain erroneous information or incomplete descriptions. In fact, as with search warrant applications, the government is likely required to amend certifications whenever it becomes aware that information previously filed with the court under oath is incomplete, inaccurate or misleading.[6] The government's affirmative obligation to correct material misrepresentations or omissions in its PAA certifications and supporting affidavits is even more compelling here than in the search warrant context because the certifications and affidavits in this matter can only be viewed by the Court (and only if a directive is challenged) and are the sole basis upon which an acquisition can be conducted.

The key overarching question, however, is what overall effect an attempted amendment has with regard to the acquisitions and directives that that are based on the original certifications. Congress made clear in the PAA that any acquisition is reliant upon, and defined by, its

[6] *See United States v. Zagari*, 111 F.3d 307, 321 (2d Cir. 1997) (noting that the government may not conceal material facts in a Title III application); *see also United States v. Shields*, 458 F.2d 269, 274 (3d Cir. 2006) (prosecution complied with duty by notifying defense counsel that statements made in affidavit in support of search warrant were false).

supporting certifications. Specifically, the PAA states that "[a]n acquisition under this section may be conducted only in accordance with the certification of the Director of National Intelligence and the Attorney General. . . ." 50 U.S.C. § 1805b(d). Congress relied on the certification process as the primary safeguard to protect private communications of United States persons from improper surveillance. In defending the constitutionality of the PAA in this proceeding, the government has fully embraced this view, arguing repeatedly that the certification required by the PAA, and the court's review of the underlying Targeting procedures, are what make the statute reasonable for purpose of Fourth Amendment analysis:

> First, before a directive may be issued, the Protect America Act requires the Government to adopt reasonable procedures for determining that the target of an acquisition under the Act is reasonably believed to be located outside the United States . . . . The Protect America Act also mandates that the Attorney General and Director of National Intelligence certify that a significant purpose of the acquisition is to acquire foreign intelligence information and that the acquisition involves obtaining such information with the assistance of a service provider. **All of these requirements significantly constrain the scope of the collection under the directives and help ensure that the collections are carefully targeted to obtain foreign intelligence information in a reasonable manner.**[7]

Given the central role that the certifications play in the Congressional framework (and under the government's constitutional analysis), once the Government makes material changes to its prior certifications, acquisitions based on the old certifications lack statutory authority under the PAA. And any changes to the Targeting Procedures or the Minimization Procedures must be viewed as material changes to a certification.[8] Congress required the government to formulate and adhere to minimization procedures "to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States

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[7] United States of America Supplemental Brief on the Fourth Amendment ("U.S. Supp. Br. on Fourth Am.") at 6 (citations omitted); *see also* Mem. in Supp. of the Gov'ts. Mot. to Compel, filed Dec. 11, 2007 at 14-18 (relying on targeting and minimization procedures and PAA certifications to justify reasonableness under the Fourth Amendment).

[8] This is particularly true if the changes to the Targeting and Minimization procedures would impact the government's reasonableness argument under the Fourth Amendment.

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persons. . . ." 50 U.S.C. § 1801(h)(1). Thus, a change to either procedure will impact the way in which the privacy of United States persons is protected. Thus, where an amendment changes the manner in which acquisitions will be conducted in a substantive and non-ministerial way, such amendments must be treated as new certifications.

II. NEW DIRECTIVES SHOULD BE ISSUED WHEN NEW CERTIFICATIONS ARE FILED

When the government submits new certifications or materially amends existing certifications, it must issue new directives, because otherwise it lacks statutory authority to enforce prior directives. In its March 5, 2008 Order, the court posed two questions directly related to this issue:

> 3. Can the government rely on a pre-existing directive if it amends a certification, or does it need to issue a new directive pursuant to the amended certification? Does the answer depend on the nature of the amendment?
>
> 4. If the government can amend certifications without issuing new directives, then how can the recipient of a directive obtain meaningful judicial review of the legality of the directive?

The text of the PAA answers these questions.

A. The Government Must Issue a New Directive When There Has Been a Material Change to a Certification or the Targeting or Minimization Procedures

As discussed above, the five-factor findings of the Director of National Intelligence and the Attorney General embodied in the certifications are prerequisites to the initiation of surveillance under the PAA. According to the text of the PAA, acquisitions can be "conducted ***only*** in accordance with ***the*** certification of the Director of National Intelligence and the Attorney General." 50 U.S.C. § 1805b(d) (emphasis added). Because the filed certifications, along with the Targeting and Minimization Procedures referenced therein, create the authority for surveillance to occur, they provide the legal basis for the issuance of directives to service providers. Where, as here, the Government disavows prior certifications and submits new

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certifications in their place, the government's prior directives are not valid because they rely on certifications based on supporting affidavits and procedures that have been superseded and no longer accurately reflect the procedures that will be used to conduct the acquisition.

In the search warrant or wiretap context, it is clear that a Court should not permit a search or wiretap to continue once it discovers that an affidavit upon which the warrant is based is inaccurate or contains material omissions. For example, in *United States v. Carneiro*, the United States Court of Appeals for the Ninth Circuit held that extension of a wiretap order was improper where the original wiretap order was based on an affidavit that contained misleading statements. 861 F.2d 1171, 1182-1183 (9th Cir. 1988). Likewise, a PAA directive cannot continue to have force once the Court is notified that the certification and supporting affidavits upon which the directive is based are inaccurate or incomplete.[9]

Where the new or amended certification changes the methodology for the interception, it should be treated like a superseding court order authorizing surveillance, which must be accompanied by a new assistance order to the provider. Just as a provider could not be required to provide assistance to the government to execute a court order for surveillance that had been superseded by a subsequent order, a provider cannot be compelled to comply with a directive based on an underlying certification that has been superseded by a subsequent filing.[10]

B. Permitting the Government to Amend Certifications Without Issuing New Directives Would Exacerbate the Constitutional Deficiencies of the PAA

The court's question as to how a recipient of a directive can obtain *meaningful* judicial review of the legality of the directive if a certification were to change after a directive has been issued requires a three point response. First, as Yahoo! has argued from the outset, the PAA is

[9] Like a certification, a FISC Order or a Title III Wiretap Order provides authority for a further order compelling service providers to provide necessary assistance and cooperation to the government. *See* 18 U.S.C. § 2518(4), 50 U.S.C. § 1805b(g).

[10] This rule would not apply to purely ministerial amendments that do not change the methodology for identifying targets or conducting surveillance.

constitutionally flawed because it precludes the court from making a reasonableness determination regarding a certification (and also of a directive issued pursuant to a certification) unless a provider challenges a directive or refuses to comply with one.[11] Second, the PAA precludes meaningful review of a directive because a provider cannot gain access to the certification or the Targeting procedures and, thus, has no basis to bring anything but a facial challenge to a directive under the PAA. Third, allowing the government to materially amend certifications without issuing new directives results in a perpetually moving target which precludes meaningful judicial review.

As to the first point, the effect of an amendment would be irrelevant to a provider who complies with a directive. Under the PAA, the government could initially file an inadequate certification, or file a thorough certification that is later amended to become inadequate, but the court can do nothing about either circumstance if the provider does not challenge the directive or refuse to comply with it.[12] In this way, the provisions of the PAA prevent the court from even attempting to exercise its constitutionally-mandated role to ensure that the privacy interests of United States persons are adequately protected from government intrusion.

As to the second point, because a provider is never given access to the certifications and procedures that underlie a directive -- even though the reasonableness of such certifications and procedures are alleged by the government to be the cornerstone of the reasonableness determination under the Fourth Amendment -- a provider has no basis on which to decide whether to challenge a directive. Instead, a provider can only reasonably adopt a policy of refusing to comply with all directives in order to ensure prior judicial review, or bring a facial

[11] *See* Yahoo!'s Mem. in Opp'n. to Mot. to Compel, filed Nov. 30, 2007 at 22 ("the court's ability to conduct the balancing needed to make a reasonableness determination is seriously constrained by the fact that it cannot evaluate the actual section 105B(a) certification.").

[12] *See* 50 U.S.C. § 1805b(h)(1)-(3).

challenge because the PAA does not meet the requirements of the Fourth Amendment.[13] The inability of a provider to review anything but boilerplate directive language is especially problematic if this court adopts the government's view that Fourth Amendment concerns are satisfied by the Targeting and Minimization procedures being used in a particular case by the executive branch. If these undisclosed (and recently amended) procedures are the basis for resolving the serious statutory Fourth Amendment concerns raised by Yahoo!, the PAA's provision allowing a provider to challenge a directive can only be invoked where the government fails to recite the required statutory language on the face of a directive, because any other type of flaw will be obscured from view.

Finally, allowing a certification to materially change after a directive has been issued, makes judicial review of a dispute especially difficult. In this case, the directives already present a moving target. As Yahoo! has argued in its earlier submissions to the Court, the challenged directives purport to provide the government with unbridled discretion to "to identify from time to time" additional, and yet-unspecified, targets for future surveillance. This "identify-as-it-goes-along" approach to identifying targets in its directives, combined with what is now an "amend-to-meet-its-needs" approach to certification, makes it virtually impossible for the court to obtain an accurate picture of the surveillance authorized by the directives, because such surveillance can be altered at any time through changes to certifications, directives and procedures. This is why the protections for U.S. citizens must be provided as statutory matter, subject to the review of a neutral and detached magistrate, not subject to the shifting procedures of the executive branch, which can follow one set of procedures today and another tomorrow.

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[13] Here, Yahoo! contends that the PAA is facially unconstitutional because it allows the government to obtain the communications of U.S. citizens located abroad or U.S. citizens in the U.S. without a prior determination by a neutral and detached magistrate, and pursuant to a legal framework that does not satisfy the reasonableness requirements of the Fourth Amendment, regardless of the procedures that the executive branch chooses to voluntarily follow.

Given the absence of automatic judicial review of a certification and the lack of disclosure of the Targeting and Minimization procedures to the only entity who can challenge a directive in advance, allowing the government to change the certifications and procedures after a provider has received a directive would strip the PAA of its intended safeguards. The combined result would be to allow the government to authorize surveillance of yet-to-be identified individual targets, based on procedures unknown to the recipients of directives, pursuant to certifications that can be amended at any time and applied retroactively. At the very least, the court should preserve the minimal protections included in the PAA and rule that the Government's approach here cannot be reconciled with the requirements of the statute.

III. THE GOVERNMENT MAY NOT SUBMIT NEW TARGETING PROCEDURES IN A WAY DESIGNED TO BYPASS JUDICIAL REVIEW

The last question posed by the court was "Can the government submit new procedures to this Court for review under 18 U.S.C. §1805c more than 120 days after the effective date of the Protect America Act but prior to the annual update envisioned by the statute." The statute is admittedly unclear in this regard. The answer that appears to be most consistent with the language and goals of the PAA is that the government may not change the procedures it uses to determine that its PAA acquisitions do not constitute electronic surveillance more than 120 days after the effective date of the PAA if such change would have the effect of avoiding any judicial review. The PAA specifies when the Attorney General must submit the procedures used by the Government to determine that its PAA acquisitions do not constitute electronic surveillance. The relevant provision is 50 U.S.C. § 1805c(a), which states:

> (a) No later than 120 days after the effective date of this Act, the Attorney General shall submit to the Court established under section 1803(a) of this title, the procedures by which the Government determines that acquisitions conducted pursuant to section 1805b of this title do not constitute electronic surveillance. The procedures submitted pursuant to this section shall be updated and submitted to the Court on an annual basis.

By the terms of this provision, the government is required to file its procedures for initial review and (if the PAA had not expired) submit them for judicial review on an annual basis.

Congress, in § 1805c(a), imposed two relevant requirements. First, Congress required this Court to review the Government's procedures. Congress reiterated this requirement in § 1805c(b), stating that this Court must "assess the Government's determination under section 1805b(a)(1) of this title that those procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 1805b of this title do not constitute electronic surveillance." Second, Congress required the Government to update and resubmit its procedures to this Court for judicial review "on an annual basis." *See* 50 U.S.C. § 1805c(a). If the government were permitted to change procedures in a way that would bypass judicial review, the Government would be depriving this Court of an opportunity to fulfill its statutorily assigned responsibilities. As a result, the government can only update its procedures outside of the specified review cycle if the updated procedures are subject to judicial review.

IV. THE PLAIN LANGUAGE OF THE SUNSET PROVISION STRIPS THIS COURT OF JURISDICTION TO COMPEL YAHOO! TO COMPLY WITH THE DIRECTIVES

The jurisdiction of this Court to compel Yahoo! to comply with the Government's directive expired with the PAA. The one thing that is clear from the sparse legislative history of the PAA, Congress never intended it to have a perpetual existence. Rather, the Act was drafted to expire 180 days after its enactment, although that expiration date was extended slightly by Pub. L. 110-55 and Pub. L. 110-182 to February 15, 2008. Congress then chose to allow the PAA to lapse in order to continue working on the shortcomings of the PAA and therefore, the provisions of the PAA ceased to have any effect. This included the provisions by which this Court's jurisdiction can be invoked in aid of the directives. *See* 50 U.S.C. § 1803 Note, PAA § 6. In fact, Congress created only one exception to the expiration of the PAA, which is set forth in Section 6(d) and provides that:

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> Authorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration. Such acquisitions shall be governed by the applicable provisions of such amendments and shall not be deemed to constitute electronic surveillance as that term is defined in section 101(f) of the Foreign Intelligence Act of 1978.

Id.

This sole exception -- preserving the validity of authorizations and directives issued prior to the PAA's expiration -- does not, by its terms, preserve this Court's jurisdiction to resolve disputes under the PAA beyond February 15, 2008. In fact, it supports the opposite conclusion -- that Congress specifically considered what aspects of the PAA should have continuing effects and determined that the provisions related to this Court's jurisdiction should not continue to exist. As the United States Supreme Court held in *United States v. Johnson*, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." 529 U.S. 53, 58 (2000). Although the stated exception to the sunset of the PAA allows surveillance that was started before the sunset of the PAA to continue, it provides no authority for this Court to continue to exercise jurisdiction to compel a provider to comply with a directive where compliance has not yet begun, nor does it allow the government to issue new directives after the PAA expires.

The government believes that the language -- "such acquisitions shall be governed by the applicable provisions of such amendments" -- functions to preserve all of the procedural aspects of the PAA with regard to any directives issued prior to the PAA's expiration date. *See* U.S. Supp. Brief on Fourth Am. at 10, n. 8. But the textual support for that interpretation is not at all clear. To the contrary, the provisions subject to the sunset provision of the PAA include the very

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provisions that provided jurisdiction to this Court to compel compliance with a directive.[14] Congress could have, but did not, allow those specific jurisdictional and enforcement provisions to remain in effect. As numerous courts have recognized in similar circumstances involving the repeal of a statute, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner v. United States*, 343 U.S. 112, 116-17 (1952); *United States v. Stromberg*, 227 F.2d 903, 907 (5th Cir. 1955); *Santos v. Guam*, 436 F.3d 1051, 1052 (9th Cir. 2006). Indeed, the rule established by the United States Supreme Court is that in such a circumstance, courts will only continue to possess jurisdiction if there is an explicit savings clause providing for such jurisdiction in plain terms:

> When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. . . . If the aim is to destroy a tribunal or take away cases from it, there is no basis for finding saving exceptions unless they are made explicit. *De La Rama S.S. Co. v. United States,* 344 U.S. 386, 390 (1953).

Congress has shown in other circumstances that when it means to empower courts with the jurisdiction to hear actions regarding an expired statute, it does so clearly and without ambiguity. For example, the Administrative Dispute Resolution Act of 1996 28 USC 1491 ("ADRA"), contains a sunset provision terminating district court jurisdiction on January 1, 2001. 28 USC 1491(b)(1). The savings provision contained within the ADRA provides that the termination of jurisdiction "shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000." ADRA, Pub.L. 104-320, § 12(e)(2), 110 Stat. 3870, 3875 (2008). Such a provision explicitly provides the court with the ability to continue to hear certain claims from the time period pre-dating the

[14] Because the procedures and remedies provided by the PAA for non-compliance with a directive are no longer in effect, the general federal Savings Clause provides no assistance here. That statute (1 U.S.C § 109 (2008)) provides that expiration of a temporary statute does not extinguish any "penalty, forfeiture, or liability." Here, enforcement of a previously issued directive would first require an enforcement action, as no penalty, forfeiture, or liability has yet been assessed, and the Statute "does not apply to remedies or procedures." *United States v. Hager*, 530 F. Supp. 2d 778, 782 (E.D. Va. 2008).

sunset. Here, Congress provided no language evincing such intent. Instead, it did the opposite, it clearly and unequivocally demonstrated its intent that the PAA be a temporary statute, made limited provisions for acquisitions and directives already being executed to continue in effect, but chose to make no provision for the continuing jurisdiction of this Court.

At best, the jurisdictional effect of the "tail" of the PAA is ambiguous. But an examination of the legislative history of the PAA resolves any ambiguity here. In passing the PAA, Member after Member made clear that Congress designed the sunset to end the temporary regime created by the PAA in its entirety:

> Mr. Speaker, what we're doing is passing a stopgap 6-month, I repeat, 6-month bill. This thing sunsets in 6 months. 153 Cong Rec H9952-05, H9958-59 (daily ed. Aug. 4, 2007) (Statement of Rep. Issa).
>
> There are procedures in the bill that must be reviewed by the FISA court for compliance with the law and reasonableness. It has a 180-sunset, which puts the obligation on us as a Congress to review the implementation of this law, to learn from that experience, to see if it works, and to monitor implementation. *Id.* at H9961 (Statement of Rep. Heather Wilson).
>
> I believe that the bill we have here before us does give our agencies the tools they need. This bill is only for 6 months. Six months. We have a lot of work to do to modernize the underlying bill in order to put in place a system that allows us to collect the information we need while protecting the rights of the American people. *Id.* at H9963 (Statement of Rep. Boehner).
>
> This is a temporary bill. It is to fill a gap. 153 Cong. Rec. S10861, 10868 (daily ed. Aug 3, 2007) (Statement of Sen. Feinstein).

Based on these many statements, there is nothing to suggest that Congress intended, much less considered, the possibility that new surveillance could be commenced under the authority of the PAA after the 6 month sunset if such surveillance had not already begun at the time the Act expired.

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DATED: March 19, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th Day of March 2008, I provided a true and correct copy of **Yahoo! Inc.'s Supplemental Briefing on Protect America Act Statutory Issues** (the "Briefing") to [redacted] an Alternate Court Security Officer, who has informed me that he will deliver one copy of the Briefing to the Court for filing, and a second copy to the:

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO FILE EXCESS PAGE BRIEF (U)

The United States of America, through the undersigned Department of Justice attorney, hereby moves this Court for leave to file the attached Memorandum in Support of the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General ("Memorandum in Support") pursuant to Section 105B of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act). ~~(S)~~

The grounds for the motion are as follows: (U)

1. Pursuant to Section 105B(e) of the Act, the Director of National Intelligence and the Attorney General issued [redacted] directives to Yahoo Inc. ("Yahoo").

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 11 December 2032~~

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On November 21, 2007, the government filed a motion to compel Yahoo's compliance with the directives pursuant to Section 105B(g). ~~(S)~~

2. On November 30, 2007, Yahoo filed its opposition to the motion to compel and moved for leave to exceed twenty pages. As noted in Yahoo's motion for leave to file an excess page brief, the United States "[did] not oppose this motion, provided it may file a response of the same length." On December 4, 2007, the Court granted Yahoo's motion to file a twenty-five page opposition. ~~(S)~~

3. The Court's rules and procedures do not provide a page limit for briefs filed in support of the government's motion to compel. Other procedures of this Court indicate a preference that briefs not exceed twenty pages unless authorized by the Court. See Procedures for Review of Petitions Filed Pursuant to Section 501(f) of FISA, § 5(b)(ii)(A); Draft Procedures for Review of Petitions Filed Under Section 105B(h) of FISA, § 7(b)(ii). (U)

4. Exclusive of the title page, Table of Contents, Table of Authorities, and exhibits, the government's Memorandum in Support totals no more than twenty-five pages. The Memorandum in Support, therefore, is "a response of the same length" as Yahoo's opposition. ~~(S)~~

5. Counsel for Yahoo has informed the government that Yahoo does not oppose this motion. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court grant it leave to file the attached twenty-five page Memorandum in Support. A proposed Order is attached hereto. ~~(S)~~

Respectfully submitted,

[redacted] and Review
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

The United States, pursuant to Section 105B(g) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act), has moved this Court for an order compelling Yahoo Inc. to comply with [redacted] directives issued by the Director of National Intelligence and Attorney General pursuant to Section 105B(e) of the Act. The United States now requests leave to file a twenty-five page memorandum in support of its motion to compel, and it appearing that such motion should be granted,

IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the motion of the United States is GRANTED, and it is

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 11 December 2032~~

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FURTHER ORDERED that the United States may file a twenty-five page memorandum in the above-captioned matter, exclusive of the title page, Table of Contents, Table of Authorities, and exhibits.

Signed ____________________________________ E.T.
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

cc:

Marc J. Zwillinger
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Washington, D.C. 20005
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Matthew G. Olsen
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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO! INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

Docket Number 105B(G): 07-01

AUTHORIZATION FOR SUR-REPLY

Because the issue of the standing of respondent, Yahoo!, to assert the Fourth Amendment rights of its customers was first raised in the government's [reply] Memorandum in Support of its Motion to Compel, and as an aid to the Court in resolving the Motion to Compel, the Court authorizes Yahoo! to file a sur-reply brief solely on the issue of standing. The sur-reply must be filed by December 28, 2007 and may not exceed five pages.

ROBERT C. BROOMFIELD
Judge, United States Foreign Intelligence
Surveillance Court

I, Karen E. Sutton, Clerk,
SC, certify that this document
a true and correct copy
of the original.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~

Docket Number: 105B(g) 07-01

MOTION FOR PARTIAL RECONSIDERATION OF ORDER AUTHORIZING SUR-REPLY TO MOTION TO COMPEL (U)

The United States of America, through the undersigned Department of Justice attorneys, hereby moves this Court to reconsider in part the Order issued by the Court on December 14, 2007, authorizing Yahoo Inc. ("Yahoo") to file a sur-reply brief on the issue of standing in the above-captioned matter. Specifically, the government requests that the Court order Yahoo to file its sur-reply on or before December 21, 2007. The grounds for this motion are as follows: ~~(S)~~

1. Pursuant to section 1805B(e) of the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA" or "the Act"), the Director of National Intelligence and the Attorney General issued [redacted] directives to Yahoo. On November 21, 2007, the government moved to compel Yahoo's compliance with the directives pursuant to

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 18 December 2032~~

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section 1805B(g). On November 29, 2007, the Court adopted the briefing schedule the parties proposed and issued an order requiring Yahoo to file its brief on November 30, 2007, and the government to file its brief on December 11, 2007. ~~(S)~~

2. In its opposition to the motion to compel, Yahoo argued, among other things, that the directives violate the Fourth Amendment rights of U.S. persons abroad and persons in the United States communicating with foreign intelligence targets. On December 11, 2007, the government filed its memorandum in support of the motion to compel, responding in part that Yahoo lacks authority to raise vicariously the Fourth Amendment rights of others. See Gov't Mem. at 5-7. ~~(S)~~

3. On December 14, 2007, this Court sua sponte issued an Order authorizing Yahoo "to file a sur-reply brief solely on the issue of standing," specifically "the issue of the standing of respondent, Yahoo!, to assert the Fourth Amendment rights of its customers." The Court ordered Yahoo to file its brief, which was not to exceed five pages, by December 28, 2007. ~~(S)~~

4. The government requests that the Court shorten the time for Yahoo to file its sur-reply brief, from December 28, 2007, to December 21, 2007. Proceedings to compel compliance with directives issued under section 1805B "shall be conducted as expeditiously as possible." 50 U.S.C. § 1805B(j). Indeed, to expedite the resolution of this matter, the government agreed with Yahoo on the original briefing schedule, which was adopted by the Court. This briefing schedule provided the government with 11

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days to respond to all of Yahoo's arguments on the merits of the motion to compel, three fewer days than the Court has now provided to Yahoo to address one discrete issue. The briefing of this motion to compel already has lasted several weeks, and the Court's authorization for a sur-reply extends the briefing schedule by two additional weeks. The government submits that one week, to December 21, 2007, is sufficient time for Yahoo to reply on the sole issue of its standing. ~~(S)~~

5. Moreover, any additional time allowed for Yahoo's sur-reply will only further delay an important foreign intelligence collection. As stated in the government's memorandum in support of its motion to compel, Yahoo's compliance with the directives will significantly enhance the government's ability to acquire valuable foreign intelligence information. See Gov't Mem. at 14; see also Gov't Ex Parte Decl. (Dec. 11, 2007) at 2 (attached to the classified appendix as Tab 4). ~~(S)~~

6. On December 18, 2007, counsel for Yahoo informed the government that Yahoo opposes this motion. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court reconsider part of its December 14, 2007 Order and require Yahoo to file its sur-reply brief on the standing issue on or before December 21, 2007. A proposed Order is attached hereto. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]

Attorney Advisors
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

The United States, pursuant to Section 105B(g) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act), has moved this Court for an order compelling Yahoo Inc. to comply with [redacted] directives issued by the Director of National Intelligence and Attorney General pursuant to Section 105B(e) of the Act. The United States now requests that the Court reconsider part of the Order issued by the Court on December 14, 2007, authorizing Yahoo Inc. to file a sur-reply brief on the issue of standing by December 28, 2007, and order Yahoo to file its sur-reply on or before December 21, 2007, and it appearing that such motion should be granted,

IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the motion of the United States is GRANTED, and it is

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 18 December 2032~~

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FURTHER ORDERED that Yahoo Inc. shall file its sur-reply brief by December 21, 2007.

Signed ______________________________ E.T.
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

cc:

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FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO!, INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **Yahoo!'s Response to Motion for Partial Reconsideration of Order Authorizing Sur-Reply to Motion to Compel** **UNDER SEAL**

Yahoo!, Inc. ("Yahoo!") through its undersigned counsel, hereby responds to the government's motion for partial reconsideration as follows:

1. At the time the Court issued, *sua sponte*, its Order authorizing Yahoo! to file a sur-reply on or before December 28, 2007 counsel for Yahoo! had started examining the standing issues presented by the government's filing.

2. As a result, Yahoo! believes that it can file its sur-reply by December 21, 2007, as the government has requested in its motion to shorten time.

3. However, because of pre-existing travel schedules of undersigned counsel for Yahoo! and the travel schedule of Yahoo!'s Assistant General Counsel who has been supervising this matter, Yahoo! cannot file its sur-reply by December 21, 2007 and adequately prepare to participate and appear at an in-person hearing in this matter before the week of January 7, 2008.

4. Although the setting of a hearing in this matter is entirely in the court's discretion, Yahoo! believes that the issues presented in this litigation are of significant complexity and national importance that a hearing would be helpful in assisting the court in deciding this matter.

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5. Because of Yahoo!'s unavailability for an in-person hearing prior to January 7, 2008, Yahoo! was unwilling to consent to the government's motion to shorten time unless the government agreed not to press for a hearing prior to the week of January 7, 2008.

6. Because the government would not agree that any hearing in this matter take place after January 7, 2008, Yahoo! did not agree to the government's motion to shorten time.

7. Yahoo! requests that notwithstanding the government's motion to shorten time, any hearing in this matter not be scheduled prior to the week of January 7, 2008. A proposed Scheduling Order is attached.

DATED: December 18, 2007

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Attorneys for Yahoo!, Inc.

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FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO!, INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **UNDER SEAL**

SCHEDULING ORDER

The United States has requested that this Court reconsider the deadline for the sur-reply authorized by its December 14, 2007 Order, and require Yahoo! to file its sur-reply seven days early, on December 21, 2007. Yahoo! has indicated that it does not object to filing its sur-reply by that date, but that it opposes the request to shorten time to the extent that such request would result in a hearing before this Court prior to January 7, 2008.

IT IS HEREBY ORDERED, that:

1. Yahoo! shall file its sur-reply on or before December 21, 2007.

2. If the court determines that a hearing in this matter would assist the court in deciding the issues, such hearing shall be held on or after January 7, 2008 and not before. The court will issue further orders with regard to the scheduling of any hearing in this matter.

Judge
United States Foreign Intelligence Surveillance Court

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December 2007, I presented by hand a true and correct copy of **Yahoo!'s Response to Motion for Partial Reconsideration of Order Authorizing Sur-Reply to Motion to Compel** (the "Response") to [redacted] Attorney Advisor for the United States Department of Justice, who has represented to me that he will deliver one copy of the Response to the Court for filing:

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10

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Filed
CSO: [redacted]
DATE

~~SECRET~~

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO!, INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Dkt. No. 105B(G) 07-01

Yahoo! Inc.'s Surreply in Opposition to Motion to Compel

UNDER SEAL

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Attorneys for Yahoo! Inc.

December 21, 2007

~~SECRET~~

~~Classified by:~~ Derivatively classified from material classified by ~~Matthew G. Olsen, Deputy~~ Assistant Attorney ~~General~~, NSD, DOJ

Reason : 1.4(c)

~~Declassify~~ on 11 December 2032

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INTRODUCTION

In its Memorandum in Support of its Motion to Compel ("DOJ Mem."), the government argues that, notwithstanding the language of the Protect America Act ("PAA"), Yahoo! does not have standing to challenge the lawfulness of the directives served upon it on [redacted] 2007 (the "Directives") based on Fourth Amendment concerns.[1] *Id.* at 7. The government is wrong.

Yahoo! has Article III standing to challenge the constitutionality of the Directives. Article III requires that the court face an actual "case or controversy." The case or controversy here is whether Yahoo! can be compelled—under threat of contempt—to devote substantial time and resources to comply with the Directives. There can be no question that Yahoo! has constitutional standing under Article III to *respond* to a motion to compel in a litigation initiated by the government. In seeking to prevent Yahoo! from raising any Fourth Amendment arguments in its response, the government is confusing Article III standing with the judicially-created doctrine of prudential standing and with the jurisprudence surrounding the exclusionary rule.[2]

As Article III standing is present, the question is whether the court is authorized to review the "lawfulness" of the Directives and the PAA with regard to the Fourth Amendment before it can compel Yahoo! to comply. On this point, the statute is clear, the court is not only authorized to, *but is required to*, make a finding as to whether a directive is "otherwise lawful," before it may compel Yahoo! to comply with it. Not only do the prudential standing limitations cited by the government

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[1] The government's arguments on this point are directly contradictory. First, the government argues that despite the court's obligation to determine whether a directive is "otherwise lawful," the court may not review Fourth Amendment issues raised by a Provider. *See* DOJ Mem. at 7, n.3. Later in its brief, however, it claims that the court's ability to review a directive for reasonableness under the Fourth Amendment saves the constitutionality of the PAA from Yahoo!'s claim that the statute impermissibly dictates a "clearly erroneous" standard of review as the only review permitted under the PAA. *Id. at 21.* The government cannot have it both ways. Under the PAA, a provider is the only entity who can challenge a directive before the FISA court. If the court cannot consider Fourth Amendment arguments in response to a provider's argument (or *sua sponte*), then it cannot consider them at all, in which case the only review it can conduct is the "clearly erroneous" review specified in Section 105C of the PAA.

[2] Indeed, if Article III standing were lacking, the court could not issue an order compelling Yahoo! to respond to a directive and dismissal of this action would be mandatory.

in exclusionary rule cases not apply here, but Congress expressly supplanted such concerns by affording providers a right to challenge the lawfulness of a directive.

ARGUMENT

1. Yahoo! Has Article III Standing to Contest the Lawfulness of a Directive

Yahoo! has Article III standing to challenge the constitutionality under the Fourth Amendment of a directive issued to it. In order to establish Article III standing, a party need only establish a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Yahoo! satisfies these elements of (a) direct injury,[3] (b) traceability, and (c) redressability because it is (a) being compelled—under threat of contempt—to devote substantial time and effort, including by redirecting engineering resources away from business operations, to comply with the government's demands,[4] (b) as a direct result of the government's issuance of an allegedly unlawful directive, and (c) the FISC has the power to set aside, modify, or decline to enforce such a directive. *See Craig v. Boren*, 429 U.S. 190, 194 (1976) (holding that a business which was required to either follow a statute and suffer economic injury or disobey the statute and suffer sanctions had established "the threshold requirements of a 'case or controversy' mandated by Art. III").[5]

2. The Court is Required to Consider Whether the Directives are "Otherwise Lawful"

The PAA requires that before this court can compel a provider to comply with a directive, it must first find that the directive "was issued in accordance with subsection (e) and is otherwise

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[3] The constitutional requirement of "direct injury" is the basis for the Court's rulings in *Raines v. Byrd*, 521 U.S. 811 (1997); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); and *United States v. Richardson*, 418 U.S. 166 (1974). Those cases are irrelevant to a provider's Article III standing where it suffers a direct injury by being compelled to comply with a directive under threat of contempt.

[4] In addition to these harms, the disclosure of private communications of its users directly threatens Yahoo!'s business interests and ability to maintain its user base, in a manner previously found to be significant. *See, e.g., Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683-84 (N.D. Cal. 2006) (noting that loss of user trust resulting from forced disclosure of user communications to DOJ was a potential burden on Google).

[5] In *Boren*, the legal duties created by the challenged statute were addressed directly to the vendors, just as the obligation to participate in the surveillance covered by the PAA and the directives is addressed to providers. *See id.* at 194.

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lawful." 50 U.S.C. § 1805b(g). Accordingly, whether or not a provider raises the issue of its customers' Fourth Amendment rights or even responds to a motion to compel at all, the FISC is still required to determine, as a threshold matter, whether the PAA gives it authority to do what the government asks. *See United States v. Megahey*, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) ("the FISC judge is statutorily obliged to ensure that each statutory prerequisite is met by the application before he may enter a surveillance order"). If the directives violate the Fourth Amendment (regardless of whose Fourth Amendment rights they violate), then the FISC has no statutory authority to issue an order compelling Yahoo! to comply, and must deny the government's motion. Here, Yahoo! is merely pointing the court to the reasons why it should not find the Directives to be "otherwise lawful"—reasons that the court could have considered *sua sponte*, and must consider, before it can compel Yahoo!'s compliance.

3. None of The Cases Cited by the Government Bar this Court from Fulfilling its Mandate to Make a Finding as to the Lawfulness of a Directive

First, the so-called doctrine of "Fourth Amendment standing" relied upon by the government has no applicability here. Under that doctrine, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself." *Alderman v. United States*, 394 U.S. 165, 171-72 (1969). The doctrine is not rooted in traditional concepts of standing but is a description of the contours of the Fourth Amendment's exclusionary rule, namely, "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant *who seeks to exclude the evidence obtained during it*." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (emphasis supplied).[6] In other words, the doctrine concerns the limits of the exclusionary rule, not any constitutional standing requirements, and consequently is irrelevant here. *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532 (8^{th} Cir. 2005) (concluding that

[6] As the Supreme Court recognized in *Rakas*, the term "standing" in that context is a misnomer. *Id. at 140* ("the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing"). In *Rakas*, the Court explicitly noted that its opinion did not deal with the "traditional standing doctrine. *Id.* at 139 (noting that "nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries[, (1) Article III standing and (2) prudential standing]").

Alderman's statement that Fourth Amendment rights may not be vicariously asserted applies only in the context of the exclusionary rule.)[7] There is nothing in the jurisprudence of "Fourth Amendment standing" that precludes a defense of unlawfulness in response to a motion to compel, particularly when—as here—Congress has explicitly provided for judicial consideration of such a defense.[8] *See Alderman*, 394 U.S. at 175 ("Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose.").

Second, prudential limitations on standing do not prevent a provider from raising the Fourth Amendment rights of its customers in this context. The Supreme Court has recognized that such prudential limitations are not constitutionally required, and are often inappropriate, particularly where the rights of the third parties in question might not otherwise be vindicated. *See, e.g.*, *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (allowing white respondent to challenge racially restrictive covenant where "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance");[9] *Griswold v. Connecticut*, 381 U.S 479, 481 (1965) (allowing doctor to assert privacy rights of patients in defending against criminal prosecution where otherwise patients' rights are "likely to be diluted or adversely affected unless those rights are considered"). In *Craig v. Boren*, the Supreme Court allowed a seller of alcohol to assert the Equal Protection rights of its customers in challenging a state statute regulating the sale of beer. The Court held that it was appropriate for the vendor to raise its customers' rights because otherwise its customers' rights would be "diluted or adversely affected." *Craig*, 429 U.S. at 195. The Court further noted

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[7] In *Heartland*, the court noted the limited applicability of *Alderman* and found that a school had associational standing to litigate the Fourth Amendment rights of its students in a civil context.

[8] *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982) does not compel a contrary conclusion. In *dicta*, the court in *Wenner* suggested that an adult-theatre owner could not assert his patron's theoretical Fourth Amendment rights. *Id.* at 1248. That case is distinguishable in that (a) the Ninth Circuit based its holding primarily on the prematurity of the claim, and (b) the Ninth Circuit was not considering a statute explicitly providing a right to challenge the ordinance in question. *Id.* at 1248. Moreover, the Court conducted no analysis of the case law governing Article III and prudential standing. Similarly, in *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), the Court's one-sentence observation that the banks in the case might not be able to vicariously assert their customer's Fourth Amendment claims was entirely *dicta*, as it was offered with no analysis, and there had been no assertion of such rights by the banks. *Id.* at 69.

[9] In *Barrows*, as here, a respondent in a civil case was raising the constitutional concerns of third parties.

that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.* That is precisely the situation here. A provider, in challenging a directive, is asserting the rights of its customers in a situation where it is unlikely—or impossible—that its customers will be able to assert that right on their own behalf.[10]

Third, prudential standing doctrines can be preempted by Congressional enactment. Here, by explicitly directing the court to determine the lawfulness of a directive, Congress demonstrated its intent that the FISC review directives for any legal infirmities, not just those legal infirmities that impinge upon the constitutional rights of providers. It is also clear that Congress anticipated that such rights would be raised by providers, as the PAA explicitly gives providers a means for challenging a directive's constitutionality, even when the government has not moved to compel. 50 U.S.C. § 1805b(h); *see Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others"); *Raines*, 521 U.S. at 820 n.3 ("Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations"). It is also clear that Fourth Amendment rights were under consideration by Congress when it enacted the PAA.[11] Any suggestion that the mandatory review provided by Congress in the PAA was meant to *exclude* Fourth Amendment issues is untenable. Accordingly, any prudential limitations that would otherwise limit the scope of the court's review have been overridden by statute.

[10] Under the terms of the PAA, only a provider has the right to challenge a directive. Individuals subject to surveillance can only bring a challenge in their own names in the unlikely event that the fruits of the foreign intelligence surveillance are used against them in a criminal case in the U.S.

[11] *See* Statement of Representative Tierney, 153 Cong. Rec. H. 9952, 9955 (expressing concern that PAA would do "violence to the Fourth Amendment and violence to our civil liberties"); Statement of Representative Hirono, *Id.* at 9964 (expressing concern that the PAA "codifies violating the Fourth Amendment"); Statement of Senator Feingold, 153 Cong. Rec. S. 10861, 10866 (expressing concern with "giving free rein to the Government to wiretap anyone, including U.S. citizens who lives overseas"); Statement of Senator Leahy, *Id.* at 10867 ("It is also essential to preserve the critical role of the FISA Court in protecting the civil liberties of Americans.").

Approved for public release by the ODNI 20160408

DATED: December 21, 2007

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Attorneys for Yahoo! Inc.

Approved for public release by the ODNI 20160408

CERTIFICATE OF SERVICE

I hereby certify that on this 21th day of December, 2007, I provided a true and correct copy of **Yahoo! Inc.'s Surreply in Opposition to Motion to Compel** (the "Surreply") to an agent designated by the Court Security Officer, who has informed me that he will deliver one copy of the Surreply to the Court for filing, and a second copy to the:

United States Department of Justice
National Security Division
950 Pennsylvania Ave., NW
Room 6150
Washington, D.C. 20530

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Attorneys for Yahoo!, Inc.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, and Rule 7(b) of the Rules of Procedure of this Court, to unseal the following documents filed in the above-captioned matter: (1) the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (filed November 21, 2007); (2) Yahoo! Inc.'s ("Yahoo") Memorandum in Opposition to Motion to Compel (filed November 30, 2007); (3) the Memorandum in Support of the Government's Motion to Compel (filed December 11, 2007); and (4) Yahoo's Sur-Reply Brief (filed December 21, 2007)

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 27 December 2032~~

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(hereinafter collectively "the Briefs"). The Government assumes for purposes of this motion that the Briefs are records of the Court pursuant to Rule 7(b). ~~(S)~~

Pursuant to Section 4 of the recently enacted Protect America Act, the Attorney General on a semiannual basis must inform specified congressional committees of "incidents of noncompliance by a specified person to whom the Attorney General and Director of National Intelligence issue a directive." Protect America Act of 2007, Pub. L. No. 110-95, § 4(1)(B), 121 Stat. 552, 555-56 (2007). In connection with this requirement, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate recently were briefed on the status of the decision of Yahoo not to comply with directives issued under the Protect America Act. On December 14, 2007, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate requested access to the Briefs in connection with the consideration of proposed legislation to amend the Foreign Intelligence Surveillance Act of 1978. ~~(S)~~

On December 21, 2007, counsel for Yahoo informed the government that Yahoo does not oppose the relief sought. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the Briefs. An agreed proposed order accompanies this motion.

~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America pursuant to Rule 7(b) of the Rules of Procedure of this Court in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (filed November 21, 2007), (2) Yahoo! Inc.'s ("Yahoo") Memorandum in Opposition to Motion to Compel (filed November 30, 2007), (3) the Memorandum in Support of the Government's Motion to Compel (filed December 11, 2007), and (4) Yahoo's Sur-Reply Brief (filed December 21, 2007)

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 27 December 2032~~

(hereinafter collectively "the Briefs"), which were filed pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Briefs to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Briefs shall remain sealed.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Briefs, redact from the Briefs the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

Approved for public release by the ODNI 20160408

cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
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Counsel for Yahoo Inc.

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~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

Docket Number 105B(G): 07-01

ORDER

The Court, having received the respondent's sur-reply on the issue of standing, and desirous of further briefing on the issue by the government,

HEREBY ORDERS that the government shall file, on or before January 4, 2008, a reply to the sur-reply filed by Yahoo!, Inc. The government's reply shall be limited to the issue of respondent's standing, and may not exceed five pages.

IT IS SO ORDERED, this 28th day of December, 2007.

REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

I, Karen E. Sutton, Clerk, FISC, certify that this document a true and correct copy f the original.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

Docket Number 105B(G): 07-01

ORDER ESTABLISHING PROCEDURES FOR HANDLING CLASSIFIED INFORMATION

To ensure that all information is properly classified and safeguarded in a manner consistent with its classification, this Court hereby establishes the following procedures for handling classified information in the above-captioned docket.

IT IS HEREBY ORDERED,

1. For the purposes of this litigation, this Court designates [redacted] Litigation Security Section, Security and Emergency Programs Staff, United States Department of Justice, as the Litigation Security Officer for the purpose of providing the security arrangements necessary to protect classified information or documents. This Court also designates Security Specialists [redacted]

2. The Litigation Security Officer shall identify appropriate representatives of the Executive Branch to review for proper classification the respondent's filings and the Court's opinions and orders in this matter.[1] The Litigation Security Officer

[1]Because the attorneys for the government in this matter include attorneys with original (continued...)

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shall ensure that no such representative is, or has been, involved substantively in the matter being litigated in this docket. The selected Executive Branch representatives shall be available to review documents and information expeditiously.

3. The Litigation Security Officer shall provide counsel for respondent access to the secure equipment necessary for that attorney to properly litigate this matter.[2] In the event the Litigation Security Officer determines it is in the best interest of national security to require respondent's counsel to work in a government facility, the Litigation Security Officer shall arrange for and maintain such facility. Counsel for respondent shall seek guidance from the Litigation Security Officer with regard to appropriate storage, handling, transmittal, and use of classified information and shall treat all information, including any oral or written communication, as presumptively classified at the highest level of his security clearance.

4. Any pleading or other document filed by the respondent shall be filed with the Court through the Litigation Security Officer or her designee. The time of physical submission to the Litigation Security Officer or designee shall be considered the date and time of filing. Immediately upon receipt, the Litigation Security Officer shall deliver to the Court and counsel for the United States any pleading or document filed by respondent. Pending the below-referenced security review, all pleadings and documents shall be treated as presumptively classified at the highest level of respondent's counsel's security clearance.

5. The Litigation Security Officer shall promptly examine any pleading or other document filed by respondent and, as appropriate, consult with the above-referenced Executive Branch representatives to determine the proper classification of the pleading or document. All such pleadings and documents shall be portion marked with the appropriate classification marking. Properly marked copies shall

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[1](...continued)
classification authority, the Court assumes that the government will properly classify and mark the information contained in its filings.

[2]Counsel for respondent has informed the Court that he currently possesses a top secret security clearance. (Request of Marc J. Zwillinger To Appear On Behalf Of Yahoo!, Inc, Nov. 30, 2007)

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be provided to the parties and the Court.

6. Any pleading or other document filed by the government shall be filed with the Litigation Security Officer or her designee. The time of physical submission to the Litigation Security Officer or designee shall be considered the date and time of filing. Immediately upon receipt, the Litigation Security Officer or her designee shall deliver to the Court and counsel for respondent any pleading or document filed by the United States, unless the government's submission is identified as *ex parte*, in which case the document shall be filed only with the Court.

7. All prior filings submitted by respondent in this matter, as well as all Orders of the Court issued to date in this matter, shall be reviewed by the Litigation Security Officer, and the above-referenced Executive Branch representatives as appropriate, to confirm that all such documents are properly classified and safeguarded.

IT IS SO ORDERED, this 28th day of December 2007.

REGGIE B. WALTON
Judge, United States Foreign Intelligence Surveillance Court

I, Karen E. Sutton, Clerk, FISC, certify that this document is a true and correct copy of the original

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

Docket Number 105B(G): 07-01

EX PARTE ORDER

On December 11, 2007, the United States filed a motion requesting permission to file a classified appendix for the Court's ex parte and in camera review. The motion recites that on December 11, 2007, "counsel for the United States informed counsel for Yahoo that the government was seeking the Court's leave to file a classified appendix, ex parte." However, no certificate of service has been filed with the Court indicating that the motion was served on counsel for Yahoo!, Inc. The two-page motion is classified at the same level as other government pleadings that have been served on Yahoo!, Inc.

IT IS HEREBY ORDERED that the Government shall file, on or before January 2, 2008, a certificate of service for the two-page motion, specifying when and how it was served on counsel for Yahoo!, Inc., or, in the alternative, a submission explaining why the motion has not been served on Yahoo!, Inc. and addressing whether it ought to be served.

The foregoing paragraph does not apply to the classified appendix that was submitted as an attachment to the motion, but is limited to the two-page motion itself.

IT IS FURTHER ORDERED that the government shall serve any document that it files in response to this Order, together with a copy of this Order, on Yahoo!, Inc., through the Litigation Security Officer, on or before the day of the government's filing; or, in the alternative, that the

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Government shall explain in its filing why its response and this Order ought not to be served on Yahoo!, Inc. Pending the Government's response, this Order is being issued ex parte.

IT IS SO ORDERED, this 28th day of December, 2007.

REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

cc: Matthew G. Olsen
Deputy Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for the United States

I, Karen E. Sutton, Clerk,
ISC certify that this document
ue and correct copy
of the original

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SECRET

THIS IS A COVER SHEET

FOR CLASSIFIED INFORMATION

ALL INDIVIDUALS HANDLING THIS INFORMATION ARE REQUIRED TO PROTECT IT FROM UNAUTHORIZED DISCLOSURE IN THE INTEREST OF THE NATIONAL SECURITY OF THE UNITED STATES.

HANDLING, STORAGE, REPRODUCTION AND DISPOSITION OF THE ATTACHED DOCUMENT MUST BE IN ACCORDANCE WITH APPLICABLE EXECUTIVE ORDER(S), STATUTE(S) AND AGENCY IMPLEMENTING REGULATIONS.

(This cover sheet is unclassified.)

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704-101
NSN 7540-01-213-7902

STANDARD FORM 704 (8-85)
Prescribed by GSA/ISOO
32 CFR 2003

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FILED WITH THE
COURT SECURITY OFFICER
CSO [redacted]
DATE: 1-9-2008

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO!, INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **Yahoo!'s Response to Motion to Unseal Records** **UNDER SEAL**

Yahoo!, Inc. ("Yahoo!") through its undersigned counsel hereby responds to the government's Motion to Unseal records as follows:

1. In its Motion to Unseal, the government stated that "On December 21, 2007, counsel for Yahoo! informed the government that Yahoo! does not oppose the relief sought." Unopposed Mot. To Unseal Records at 2. That statement is accurate, but not complete.

2. On December 21, 2007, counsel for Yahoo! informed the government that it did not oppose the motion provided that the unsealing was limited to the disclosure of the Briefs to the identified Senate and House Committees in the Proposed Order that accompanied the motion, and further provided that prior to such disclosure, the government would redact from the Briefs the name of Yahoo! and all other references that would disclose the identity of Yahoo!, as specified in the Proposed Order.

3. Although the language of the Proposed Order submitted to the court correctly memorializes the agreement between Yahoo! and the government, the body of the Motion to Unseal does not describe the complete agreement of the parties.

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4. Accordingly, the purpose of this filing is to inform the Court that Yahoo!'s non-opposition to the government's motion to unseal was intended to be conditioned on the qualifications contained in the Proposed Order.

DATED: January 9, 2008

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mzwillinger@sonnenschein.com

Attorneys for Yahoo!, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 2008, I presented by hand a true and correct copy of **Yahoo!'s Response to Motion to Unseal** (the "Response") to [redacted] a Court-designated alternate Litigation Security Officer, who has represented to me that she will deliver one copy of the Response to the Court for filing and one copy to counsel for the United States, at the United States Department of Justice, National Security Division.

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Attorneys for Yahoo!, Inc.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America pursuant to Rule 7(b) of the Rules of Procedure of this Court in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (filed November 21, 2007), (2) Yahoo! Inc.'s ("Yahoo") Memorandum in Opposition to Motion to Compel (filed November 30, 2007), (3) the Memorandum in Support of the Government's Motion to Compel (filed December 11, 2007), and (4) Yahoo's Sur-Reply Brief (filed December 21, 2007)

Derived From:	Motion to the USFISC in Docket Number captioned above
Declassify on:	27 December 2032

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(hereinafter collectively "the Briefs"), which were filed pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Briefs to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Briefs shall remain sealed.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Briefs, redact from the Briefs the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed ______________________ Eastern Time
Date Time

MALCOLM J. HOWARD
Judge, United States Foreign
Intelligence Surveillance Court

[redacted]
FISC, certify that this document
is a true and correct copy of
the original.

cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
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Counsel for Yahoo Inc.

Matthew G. Olsen
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Counsel for the United States

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORD (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, and Rule 7(b) of the Rules of Procedure of this Court, to unseal the following document filed in the above-captioned matter: the Government's Reply to Yahoo! Inc.'s ("Yahoo") Sur-Reply (filed January 4, 2008). The Government assumes for purposes of this motion that the Reply to Yahoo's Sur-Reply is a record of the Court pursuant to Rule 7(b). ~~(S)~~

Pursuant to Section 4 of the recently enacted Protect America Act, the Attorney General on a semiannual basis must inform specified congressional committees of "incidents of noncompliance by a specified person to whom the Attorney General and

~~Classified by:~~	Matthew G. Olsen, ~~Deputy Assistant Attorney General~~, NSD, DOJ
Reason:	~~1.4 (c)~~
Declassify ~~on~~:	14 January 2033

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Director of National Intelligence issue a directive." Protect America Act of 2007, Pub. L. No. 110-95, § 4(1)(B), 121 Stat. 552, 555-56 (2007). In connection with this requirement, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate recently were briefed on the status of the decision of Yahoo not to comply with directives issued under the Protect America Act. On December 14, 2007, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate requested access to the Briefs in connection with the consideration of proposed legislation to amend the Foreign Intelligence Surveillance Act of 1978. ~~(S)~~

On December 27, 2007, the Government requested that the Court unseal the following documents: (1) the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (filed November 21, 2007); (2) Yahoo's Memorandum in Opposition to Motion to Compel (filed November 30, 2007); (3) the Memorandum in Support of the Government's Motion to Compel (filed December 11, 2007); and (4) Yahoo's Sur-Reply Brief (filed December 21, 2007). Counsel for Yahoo did not oppose the Government's motion provided that the disclosure was for the limited purpose of providing the briefs to the above-referenced Congressional committees and that prior to disclosure of the briefs the Government would redact from the briefs the name of Yahoo and all other references

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that would disclose the identity of Yahoo. On January 10, 2008, the Court granted the Government's motion. ~~(S)~~

On December 28, 2007, the day after the Government filed its initial motion to unseal, the Court ordered the Government to file a Reply to Yahoo's Sur-Reply on or before January 4, 2008. The Government filed its Reply to Yahoo's Sur-Reply on January 4, 2008. To provide a full set of the briefs to the above-referenced Congressional committees, the Government now moves the Court to unseal the Reply to Yahoo's Sur-Reply. ~~(S)~~

On January 11, 2008, counsel for Yahoo informed the Government that Yahoo does not oppose the relief sought provided that: (i) the Reply to Yahoo's Sur-Reply is unsealed for the limited purpose of allowing the Government to disclose and submit the Reply to Yahoo's Sur-Reply to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives; and (ii) prior to such disclosure, the Government will redact from the Reply to Yahoo's Sur-Reply the name of Yahoo and all other references that would disclose the identity of Yahoo. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the Reply to Yahoo's Sur-Reply. An agreed proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]

Attorney Advisors
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America pursuant to Rule 7(b) of the Rules of Procedure of this Court in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal the Government's Reply to Yahoo! Inc.'s ("Yahoo") Sur-Reply, which was filed on January 4, 2008, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Reply to Yahoo's Sur-Reply to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 14 January 2033~~

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Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Reply to Yahoo's Sur-Reply shall remain sealed.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Reply to Yahoo's Sur-Reply, redact from the Reply to Yahoo's Sur-Reply the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

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cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
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Counsel for Yahoo Inc.

Matthew G. Olsen
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Counsel for the United States

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on January 14, 2008, true and correct copies of the United States of America's Unopposed Motion to Unseal Record, with proposed order, and this Certificate of Service were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

Respectfully submitted,

[redacted]

U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 2 January 2033~~

FSC 119

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America pursuant to Rule 7(b) of the Rules of Procedure of this Court in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal the Government's Reply to Yahoo! Inc.'s ("Yahoo") Sur-Reply, which was filed on January 4, 2008, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Reply to Yahoo's Sur-Reply to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on

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~~Declassify on: 14 January 2033~~

Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Reply to Yahoo's Sur-Reply shall remain sealed.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Reply to Yahoo's Sur-Reply, redact from the Reply to Yahoo's Sur-Reply the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed 01-17-2008 09:41 Eastern Time
Date Time

GEORGE P KAZEN
Judge, United States Foreign
Intelligence Surveillance Court

I, Karen E. Sutton, Clerk, FISC, certify that this document is a true and correct copy of the original

cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W., Suite 600 East Tower
Washington, D.C. 20005
Counsel for Yahoo Inc.

Matthew G. Olsen
Deputy Assistant Attorney General
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950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for the United States

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Filed [redacted] CSC

DATE 2/7/08

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO!, INC PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **Motion for Extension of Time to File Supplemental Briefing** **UNDER SEAL**

Yahoo!, Inc. ("Yahoo!") through its undersigned counsel, hereby moves for a forty-eight (48) hour extension of time until February 15, 2008 for the filing of its supplemental briefing pursuant to the Court's February 6, 2008 Order. In support of this motion Yahoo! states:

1. On February 6, 2008 at 4:45 pm, Yahoo! was served with the Court's Order requiring supplemental briefing related to U.S. citizens' legitimate expectations of privacy in communications carried or maintained by Yahoo!.

2. According to that Order, Yahoo!'s brief is to be filed no later than February 13, 2008, and may not exceed ten pages.

3. [redacted] the cleared in-house counsel for Yahoo! on this matter (who previously filed a declaration with this court), has previously-scheduled business travel that requires her to be out of the country from February 11, 2008 through the evening of February 13, 2008. While on foreign travel, she cannot assist in the preparation of Yahoo!'s supplemental brief prior to filing, nor can she review the brief prior to filing.

4. Counsel for Yahoo! cannot complete its supplemental briefing in the short time prior to [redacted] departure.

5. A brief extension of the deadline for supplemental briefing, until February 15, 2008, would be sufficient to allow in-house counsel for Yahoo! to participate in and authorize the filing of Yahoo!'s supplemental brief and is no longer than necessary for that purpose.

6. Counsel with Yahoo! has conferred with the government on this Motion for Extension of Time. During that conference, Yahoo! was informed that, notwithstanding the minimal schedule accommodation requested by Yahoo!, the government will not consent to any extensions of time in this matter.

7. Yahoo! respectfully requests that the deadline for filing the supplemental briefing in this matter be extended to February 15, 2008.

DATED: February 7, 2008

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Fax: (202) 408-6399
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Attorneys for Yahoo!, Inc.

SO ORDERED:

____

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2008, I provided two true and correct copies of **Yahoo!'s Motion For Extension of Time to File Supplemental Briefing** (the "Motion") to [redacted] an alternate Court Security Officer, who has informed me that he will deliver one copy of the Request to the Court for filing, and a second copy to the:

United States Department of Justice
National Security Division
950 Pennsylvania Ave., NW
Room 6150
Washington, D.C. 20530

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Attorneys for Yahoo!, Inc.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g) 07-01 (S)

OPPOSITION TO MOTION FOR
<u>EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEFING</u> (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby opposes Yahoo! Inc.'s ("Yahoo") Motion for Extension of Time to File Supplemental Briefing. (S)

On February 6, 2008, the Court issued an Order requiring the parties to provide further briefing on the issue of whether "the directives to Yahoo require Yahoo to assist the government in acquiring any class of communications or information in which a U.S. citizen would have a legitimate expectation of privacy under the Fourth Amendment." The Court ordered the parties to file their briefs no later than February 13, 2008. On February 7, 2008, Yahoo requested an extension until February 15, 2008, on the grounds that Yahoo's cleared in-house counsel has previously-scheduled business

Classified by:	Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason:	1.4 (c)
Declassify on:	8 February 2033

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travel that requires her to be out of the country from February 11-13, 2008, and Yahoo's counsel cannot complete a supplemental brief prior to her departure. (S)

The government opposes Yahoo's motion because, as described in the Memorandum in Support of the Government's Motion to Compel Compliance With Directives of the Director of National Intelligence and Attorney General, Yahoo's compliance with the directives will significantly enhance the government's ability to acquire valuable foreign intelligence information. See Gov't Mem. dated Dec. 11, 2007, at 4, 13-14. Any delay will further impede the acquisition of this valuable foreign intelligence information. (S)

Alternatively, the government moves the Court to extend the time for both parties to file supplemental briefing until February 15, 2008. The Court's February 6, 2008, Order contemplated that both parties would file their supplemental briefs on the same day. However, Yahoo's motion for an extension of time is unclear as to whether it requests an extension of time for both parties or solely for Yahoo. Accordingly, the government requests that if the Court grants Yahoo's motion, it grant the same extension of time to the government. On February 8, 2008, counsel for Yahoo informed the government that Yahoo does not oppose the alternative relief sought. (S)

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court deny Yahoo's motion for an extension of time. Alternatively, if the Court grants Yahoo's request for an extension, the government respectfully requests that the Court extend the time for the government to file its supplemental brief until February 15, 2008. A proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice (U)

[redacted]
National Security Division
United States Department of Justice (U)

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01 ~~(S)~~

ORDER

This matter having come before this Court on the motion of Yahoo! Inc. in the above-captioned docket number and, relying upon the facts set forth in the motion, ~~(S)~~

IT IS HEREBY ORDERED that Yahoo! Inc.'s motion for extension of time to file supplemental briefing is DENIED. ~~(S)~~

Signed ______________________ Eastern Time (U)
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court (U)

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 8 February 2033~~

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cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W., Suite 600 East Tower
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Counsel for Yahoo Inc. ~~(S)~~

Matthew G. Olsen
Deputy Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
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Counsel for the United States (U)

~~Classified by: Mark A. Bradley~~
~~National Security Division~~
~~U.S. Department of Justice~~
~~Declassify on: February 14, 2033~~

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01 ~~(S)~~

<u>CERTIFICATE OF SERVICE</u> (U)

I hereby certify that, on February 8, 2008, true and correct copies of the United States of America's Opposition to Motion for Extension of Time to File Supplemental Briefing and this Certificate of Service were submitted, by hand delivery, to [redacted], a Court-designated Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]
Attorney Advisor
National Security Division
U.S. Department of Justice (U)

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO INC.

PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Docket No. 105B(g) 07-01

<u>ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL BRIEFING</u>

For good cause shown, the Court has GRANTED the Motion for Extension of Time to File Supplemental Briefing filed by Yahoo! Inc. on February 7, 2008, as both parties were notified, through counsel, by conference call on February 8, 2008. The submissions of both parties pursuant to the Order of this Court issued on February 6, 2008, shall be filed on or before February 15, 2008.

Entered this 12th day of February, 2008.

REGGIE B. WALTON
Judge, Foreign Intelligence
Surveillance Court

I, Karen E. Sutton, Clerk, FISC, certify that this document is a true and correct copy of the original.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (S)

Docket Number 105B(G): 07-01

EX PARTE ORDER TO THE GOVERNMENT

The Court is issuing this ex parte order to the Government requiring it to provide clarification concerning the impact on this case of various government filings that have been made to the FISC under separate docket.

On December 11, 2007, the government submitted for this Court's ex parte and in camera consideration in this matter a Classified Appendix to its Memorandum in Support of the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General. The appendix contained, among other things, [redacted] together with related materials, such as affidavits, minimization procedures, and procedures for assessing the location of potential targets. The government's Memorandum in Support of the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (hereafter, "Memorandum") cited to the certifications and related materials in this classified appendix in support of the government's argument that the directives to Yahoo at issue in this litigation comport with the Fourth Amendment. See, e.g., Memorandum, at 13-20, fn12 (... "the government submits that the directives, the supporting certifications, affidavits, and procedures more than demonstrate the reasonableness of any acquisition pursuant to the directives.")

Earlier this month, the government filed, under separate docket and not as part of the litigation in this matter, documents that purport to amend [redacted] These documents reference various supporting documents, including affidavits and procedures, that were not included with the filings. Because the government relies in part on the pre-amendment certifications and related affidavits and procedures in the above-captioned matter, it is necessary to clarify whether the government intends for such amendments

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to apply to the directives to Yahoo that are at issue in this proceeding.

It is HEREBY ORDERED that the government shall file a brief no later than February 20, 2008, addressing the following questions:

1. Whether the classified appendix that was provided to the Court in December 2007 constitutes the complete and up-to-date set of certifications and supporting documents (to include affidavits, procedures concerning the location of targets, and minimization procedures) that are applicable to the directives at issue in this proceeding. If the answer to this question is "yes," the government's brief may be filed ex parte. If the government chooses to serve Yahoo with a copy of the brief, it shall serve a copy of this Order upon Yahoo as well;

2. If the answer to question number one is "no," the Government shall state what additional documents it believes are currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. The government shall file copies of any such documents with the Court concurrent with filing its brief. The government shall serve copies of this Order, its brief, and any additional documents upon Yahoo, unless the government moves this Court for leave to file its submission ex parte, either in whole or in part. If the government files such a motion with the Court, it shall serve a copy of its motion upon Yahoo. The government shall also serve a copy of this Order upon Yahoo, unless the government establishes good cause for not doing so within the submission it seeks to file ex parte.

IT IS SO ORDERED, this 15th day of February, 2008.

REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

cc: Matthew G. Olsen
Deputy Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for the United States

[redacted]

[redacted]

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FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO! INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

Dkt. No. 105B(G) 07-01 ~~(S)~~

Yahoo! Inc.'s Supplemental Briefing on Fourth Amendment Issues ~~(S)~~

UNDER SEAL (U)

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Attorneys for Yahoo! Inc. ~~(S)~~

February 15, 2008 (U)

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INTRODUCTION (U)

On February 6, 2008, this Court asked Yahoo! to submit a supplemental brief addressing whether "the Directives to Yahoo! require Yahoo! to assist the government in acquiring *any* class of communications or information in which a *U.S. citizen* would have a legitimate expectation of privacy under the Fourth Amendment." The answer is unequivocally "*Yes*."[1] ~~(S)~~

First, the privacy interests of U.S. citizens who use Yahoo!'s services are implicated where a U.S. user temporarily located overseas is the target of a directive, or when a U.S. citizen in the U.S. is using Yahoo!'s services to communicate with the target of a directive. Although the communications of an overseas U.S. citizen may be subject to interception by a foreign government under a different surveillance regime than in the U.S., such citizens still have a legitimate expectation of privacy against warrantless surveillance by their own government no matter where they are located.[2] *See Reid v. Covert*, 354 U.S. 1, 6 (1957); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974). ~~(S)~~

Second, the types of [redacted] communications requested by the government include [redacted] in which U.S. citizens clearly have reasonable expectations of privacy. Additionally, the government seeks access to [redacted], in which targeted U.S. citizens also have legitimate privacy interests. Section I of this memorandum describes Yahoo! users' legitimate expectations of privacy i[redacted] Section II discusses the expectations of privacy of Yahoo! users i[redacted] ~~(S)~~

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[1] The government has never claimed that the Fourth Amendment does not apply to the interception of [redacted] sent or received by U.S. citizens, nor could it. *See* Mem in Supp. of Mot. to Compel at 13 ("Surveillance of U.S. persons abroad and foreign intelligence targets communicating with U.S. persons conducted pursuant to the challenged directives complies with the Fourth Amendment if it is reasonable under the totality of the circumstances"). (U)

[redacted] (U)

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ARGUMENT (U)

I. U.S. Citizens Have Reasonable Expectations of Privacy in Their [redacted] (S)

The protection of communications and recorded information against unreasonable search and seizure is central to the Fourth Amendment's protections. In extending Fourth Amendment protection to the contents of telephone calls, the Supreme Court in *Katz v. United States* established a two-part test that governs whether communications are protected by the Fourth Amendment. 389 U.S. 347, 351, 353 (1967). This two-part test asks first whether the person who has been targeted has a subjective expectation of privacy. Second, the test asks whether society is prepared to recognize that expectation of privacy as being objectively reasonable. *See id.* at 361 (Harlan, J. concurring); *see also Smith v. Maryland*, 442 U.S. 735, 740 (1979). (U)

All of the [redacted] – satisfy the *Katz* two-part test. In the 40 years since the *Katz* decision, the types of private communications that once would have taken place over the telephone and through the U.S. mail now occur [redacted] The daily use of these technologies by tens of millions of people is a testament to the public's expectation that these communications are private. Moreover, as set forth below, judicial decisions and the U.S. Congress have confirmed that the public's expectation of privacy in these communications is objectively reasonable. As a result, the communications called for by the Directives, like the phone calls in *Katz* are protected by the Fourth Amendment. (S)

A. U.S. Citizens who use Yahoo!'s Mail Service Legitimately Expect Their [redacted] to be as Private as U.S. Mail or Telephone Calls. (S)

Email communications have become a ubiquitous part of American society. In number, they dwarf the number of letters sent through the U.S. mail. Email communications cover every imaginable topic, including intimate love letters, private attorney-client communications, and

1 [redacted] (S)

personal medical and financial information. Just as the public expects that the Government will not intercept and read the contents of a letter sent in the U.S. Mail, or listen in on a telephone call, the content of emails is something that the user "seeks to preserve as private," and therefore "may be constitutionally protected." *Katz*, 389 U.S. at 351. Given the widespread use of email, protecting email is as important to Fourth Amendment principles as protecting telephone conversations. (U)

Not surprisingly, courts have applied the two-part test from *Katz* to hold that there is a reasonable expectation of privacy in the contents of email accounts, particularly email accounts maintained by commercial internet service providers.[4] *See e.g., United States v. Maxwell*, 45 M.J. 406, 418-419 (C.A.A.F. 1996) (finding, with regard to AOL email, that "the transmitter of an email message enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant"); *United States v. Sims*, No. CR 00-193 MV, 2001 U.S. Dist. LEXIS 25819, at *45 (D.N.M. 2001) (holding that "[b]ecause Mr. Sims had an expectation of privacy in his computer and e-mail, the Fourth Amendment protections against unreasonable searches and seizures applies"), *aff'd*, 428 F.3d 945 (10th Cir. 2005); *United States v. Long*, 64 M.J. 57, 64-65 (C.A.A.F. 2006) (military officer had an objectively reasonable expectation of privacy in emails maintained in an account on an unclassified government computer system).[5] (U)

Congress recognized that an expectation of privacy in email communications was objectively reasonable when it passed the Electronic Communications Privacy Act of 1986. In it, Congress extended the statutory protections of Title III to email communications by amending the Wiretap Act

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[4] In 2006, the United States District Court for the District of Rhode Island held that the Fourth Amendment protects a user's Yahoo! email account against unreasonable search and seizure. *Wilson v. Moreau*, 440 F. Supp. 2d 81, 108 (D.R.I. 2006), *aff'd* 492 F.3d 50 (2007). (U)

[5] Courts have also found that the contents of email are entitled to Fourth Amendment protection when considering what types of addressing and signaling information related to email can be obtained without a warrant. For example, in *United States v. Forrester*, the United States Court of Appeals for the Ninth Circuit compared *Smith* with *Katz* in order to conclude that "the [Supreme] Court in *Smith* and *Katz* drew a clear line between unprotected addressing information and protected content information." *Forrester*, 512 F.3d 500, 503 (9th Cir. 2008). (U)

to protect electronic communications. It did so specifically to extend statutory privacy protections to email, while fully expecting that Fourth Amendment protections would shortly follow:

> There are no reported cases governing the acquisition of email by the government, so an application of the Fourth Amendment to the interception of email is speculative. It appears likely, however, that courts would find that the parties to an email transmission have a reasonable expectation of privacy and that a warrant of some kind is required. H.R. Rep. No. 99-647, at 22 (1986) (U)

[redacted] By requiring a Title III Order to conduct email surveillance, extending Wiretap laws to cover emails, and [redacted] Congress unequivocally established that the public's expectation of privacy in email is "one that society is prepared to recognize as 'reasonable." *Katz*, 389 U.S. at 361(Harlan, J., concurring).[6] (U)

[redacted]

[6] "Letters and other sealed packages are in the general class of effects in which the public at large has a reasonable expectation of privacy; warrantless searches of such effects are presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 114 (1984); *United States v. Chadwick*, 433 U.S. 1, 10 (1977). (U)

[redacted]

[illegible] According to § 2510(1), "wire communication" means "any aural transfer made in whole or in part though the use of facilities for the transmission of communications by the aid of wire, cable. . . ." An "aural transfer"

[redacted]

is defined as "a transfer containing the human voice at any point between and including the point of origin and point of reception." *See 18 U.S.C.* § 2510(18). (U)

[redacted]

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[redacted]

[redacted]

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DATED: February 15, 2008

/s/

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Attorneys for Provider ~~(S)~~

CERTIFICATE OF SERVICE (U)

I hereby certify that on this 15th Day of February 2008, I provided a true and correct copy of **Yahoo! Inc.'s Supplemental Briefing on Fourth Amendment Issues** (the "Briefing") to [redacted], an Alternate Court Security Officer, who has informed me that he will deliver one copy of the Briefing to the Court for filing, and a second copy to the: (TS)

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National Security Division
950 Pennsylvania Ave., NW
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Washington, D.C. 20530 (U)

/s/

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Attorneys for Yahoo!, Inc. (TS)

~~Classified by: Mark A. Bradley, National Security Division, U.S. Department of Justice~~
~~Declassify on: February 15, 2033~~

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

OPPOSITION TO MOTION FOR DISCLOSURE OF FILINGS (U)

The United States of America, through the undersigned Department of Justice attorney, hereby opposes the motion of Yahoo! Inc. ("Yahoo") for the disclosure of the Court's opinion and order approving the government's use of certain targeting procedures under the Protect America Act of 2007 ("Protect America Act"), In re DNI/AG Certification [redacted] ("Procedures Opinion"), and the government's classified appendix ("Classified Appendix") filed in the above-captioned matter on February 20, 2008, for the Court's ex parte and in camera review. This Court should deny Yahoo's motion in its entirety. The motion reflects a fundamental misapprehension about the nature of this proceeding and, from that, Yahoo's rights as a litigant before this Court. ~~(S)~~

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 26 February 2033~~

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This proceeding concerns the lawfulness of directives to Yahoo for the collection of foreign intelligence information under provisions of the Protect America Act. See 50 U.S.C. § 1805B(g) (permitting the government to invoke the aid of this Court to compel compliance with lawful directives issued under the Protect America Act). Courts generally determine the lawfulness of surveillance, particularly foreign intelligence surveillance, ex parte and in camera. See, e.g., United States v. Belfield, 692 F.2d 141, 149 (D.C. Cir. 1982) ("In this circuit and in others, it has constantly been held that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an in camera, ex parte basis."); United States v. Bin Laden, 126 F. Supp. 2d 264, 286-88 (S.D.N.Y. 2000) (denying, based on ex parte and in camera review, motion to suppress evidence from foreign intelligence physical search and electronic surveillance). See also Taglianetti v. United States, 394 U.S. 316, 317-18 (1969) (determining that the Court does not require "an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance" and finding that, in that case, the task was not "too complex . . . to rely wholly on the in camera judgment of the trial court"); Giordano v. United States, 394 U.S. 310, 313 (1969) (explaining that district court does not need to hold adversary hearing to determine the lawfulness of surveillance). ~~(S)~~

This proceeding, moreover, is governed by the Protect America Act, which explicitly provides for ex parte and in camera review of "any Government submission . . . which may include classified information." See 50 U.S.C. § 1805B(k). As such,

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although the Protect America Act authorizes a person receiving a directive to challenge the directive in a proceeding before this Court, see 50 U.S.C. § 1805B(h), and also permits the government to seek the aid of this Court to enforce compliance with lawful directives under the Protect America Act, see 50 U.S.C. § 1805B(g), it also specifically requires this Court, upon request of the government, to conduct its review of certain classified government filings ex parte and in camera. See 50 U.S.C. § 1805B(k) (providing that "[i]n any proceedings under this section"—including adversarial motions to compel and petitions to challenge the legality of a directive—"the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information."). ~~(S)~~

In addition, Yahoo's motion is squarely at odds with the manner in which Fourth Amendment questions and other issues involving the Foreign Intelligence Surveillance Act of 1978, as amended (FISA), are litigated in federal district courts around the country. Where the government seeks to use FISA-derived information in criminal proceedings, district courts have reviewed, ex parte and in camera, applications, orders and other materials to determine whether electronic surveillance and physical search were lawfully authorized and conducted. See 50 U.S.C. § 1806(f); 50 U.S.C. § 1825(g). FISA authorizes the disclosure of portions of applications, orders, and other materials relating to the electronic surveillance and physical search "only where such disclosure

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is necessary to make an accurate determination of the legality of the surveillance [or search]." See id. In the approximately thirty years since the adoption of FISA, no court has held that disclosure of such documents is necessary to determine the legality of electronic surveillance and physical search. Similarly, there is of course a long history of ex parte and in camera proceedings before this Court. For almost three decades, this Court has determined, ex parte and in camera, the lawfulness of electronic surveillance and physical search under FISA. See 50 U.S.C. § 1805(a) ("the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance" upon making certain findings); 50 U.S.C. § 1824(a) (same with respect to physical search). ~~(S)~~

Under the Protect America Act, then, the government has an unqualified right to have the Court review a classified submission ex parte and in camera which, of course, includes the unqualified right to keep that submission from being disclosed to any party in an adversarial proceeding before this Court. Indeed, while section 1805B(k) provides a mechanism for the government to submit information for ex parte and in camera review in an adversarial proceeding under the Protect America Act, it contains no provision for a litigant to seek access to such information. The import of section 1805B(k) is thus clear: Yahoo is not entitled to every classified document filed in this proceeding. ~~(S)~~

The Classified Appendix and Procedures Opinion are documents that should not be disclosed to Yahoo. Because the government properly submitted the Classified

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Appendix pursuant to section 1805B(k), the plain language of the statute prohibits the disclosure of the appendix to Yahoo. The Procedures Opinion is derivative of those very documents, both in terms of content and classification level, and likewise should not be disclosed. Both documents also contain highly sensitive top secret and compartmented national security information. Disclosure of that information—which involves highly sensitive, classified information relating to sources and methods of intelligence collection—even to cleared opposition counsel could present a substantial threat to United States government intelligence operations. ~~(S)~~

Moreover, neither the Classified Appendix nor the Procedures Opinion contains information that Yahoo needs to present its arguments about the legality of the directives. To the extent the government relies on the Procedures Opinion in making its argument in its Supplemental Brief, it is only for the proposition that this Court found that the Government's procedures satisfy the statutory requirements of the Protect America Act and that the Court noted the protection provided to United States persons by the government's minimization procedures. See Gov't Supp. Br. on Fourth Am. at 6, 9. Providing the Procedures Opinion to Yahoo would not provide Yahoo with any additional information on which the Government bases its argument, but would reveal other highly sensitive details with respect to the government's targeting procedures. And, with respect to the Classified Appendix, where the government relies on portions of the appendix to make its arguments with respect to the Fourth Amendment

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reasonableness of the acquisition, the government has provided quotations from the relevant parts of the appendix or has summarized the relevant information. See, e.g., Gov't Mem. in Support of Mot. to Compel at 15-17 & n.14; Gov't Supp. Br. on Fourth Am. at 6-7 & n.6.[1] ~~(S)~~

The fact that Yahoo's counsel has a top secret-level security clearance does not entitle counsel to see the Procedures Opinion and Classified Appendix. Only persons with a need-to-know may view those documents. Thus, while counsel's security clearance permits him to see certain classified documents, it "do[es] not entitle [him] to see all documents with that classification." Bin Laden, 126 F. Supp. 2d 287 n.27. See also United States v. Libby, 429 F. Supp. 2d 18, 24 n.8 (D.D.C. 2006) ("It is axiomatic that even if the defendant and his attorneys had been granted the highest level of security clearances, that fact alone would not entitle them to access to every piece of classified information this country possesses."), amended on other grounds, 429 F. Supp. 2d 46 (D.D.C.). Given Yahoo's limited role in this foreign intelligence proceeding to determine the lawfulness of the directives, Yahoo does not have a "need-to-know" the information contained in the Procedures Opinion and Classified Appendix. Indeed, the materials included in the classified appendix contain information that (with the exception of the directive to Yahoo itself) a provider like Yahoo would never have access to in the normal course of acquisition under the Protect America Act and do not contain

[1] As Yahoo itself admits, it did not oppose the government's initial motion for leave to file a classified appendix pursuant to section 1805B(k). See Yahoo Mot. for Disclosure of Filings at ¶ 9. ~~(S)~~

information that Yahoo needs to know in order to provide the required assistance or to litigate the legality of the directives. ~~(S)~~

Yahoo's counsel also has no security clearance for the sensitive compartmented information contained in the Procedures Opinion and Classified Appendix. Redacting compartmented information—even assuming that such redaction is possible given the nature of the documents at issue—does not produce a different result. Even assuming that the government could redact compartmented information from the documents, Yahoo still lacks a need-to-know.[2] ~~(S)~~

[2] Yahoo reserved the possibility that it would seek to provide additional briefings to the Court, inter alia, on how the Procedures Opinion and Classified Appendix impact a Fourth Amendment analysis of the directives. See Yahoo Mot. for Disclosure of Filings at ¶¶ 5, 12. Yahoo is not entitled to those documents and no further briefing is appropriate. Indeed, the extensive briefing on the legality of the directives that has taken place thus far in this litigation has covered the waterfront of legal issues at stake in this matter. Further briefing will only delay resolution of this important matter and prevent the government from obtaining compliance with its lawful directive. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court deny Yahoo's Motion for Disclosure of Filings. A proposed Order is attached hereto. ~~(S)~~

Respectfully submitted,

[redacted]

Office of Intelligence Policy and Review
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

The United States, pursuant to Section 105B(g) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act), has moved this Court for an order compelling Yahoo Inc. ("Yahoo") to comply with [redacted] directives issued by the Director of National Intelligence and Attorney General pursuant to Section 105B(e) of the Act. Yahoo has moved for the disclosure of certain documents, namely the Court's opinion and order approving the government's use of certain targeting procedures under the Protect America Act of 2007 ("Protect America Act"), In re DNI/AG Certification [redacted] ("Procedures Opinion"), and the government's classified appendix ("Classified Appendix") filed in the above-captioned matter on February 20, 2008, for the Court's ex parte and in camera review. It appearing that such motion should be denied,

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 26 February 2033~~

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IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the motion of Yahoo is DENIED.

Signed ____ E.T.
Date Time

____

REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on February 26, 2008, a true and correct copy of the United States of America's Opposition to Motion for Disclosure of Filings was submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]
National Security Division
U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 26 February 2033~~

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Filed [redacted]
CSO [redacted]
DATE: 2-29-08

~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (S)

Docket Number 105B(g): 07-01

ORDER

DIRECTING FURTHER BRIEFING ON THE PROTECT AMERICA ACT

The Court deeply regrets the need to require additional briefing. However, as discussed more fully below, the government's decision to "amend" its certifications, to issue new procedures for the acquisition of foreign intelligence information, and to revise the underlying minimization procedures, all pursuant to the Protect America Act (PAA), raises significant questions about what record the Court should consider in deciding the matter before it. The Court, therefore, requires further briefing to ascertain the statutory basis for considering these additional filings as part of the record in this matter.

Throughout this litigation, the government has pressed the Court and respondent for expedited briefing and consideration of this case. This Court is fully cognizant of the importance the government places on securing the assistance of Yahoo!, Inc. (Yahoo) in acquiring foreign intelligence information, as well as the potential impact of such acquisition on the constitutional rights of American citizens at home and abroad. This Court is also well aware that Congress has directed that proceedings under the PAA be "concluded as expeditiously as possible." 50 U.S.C.

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§ 1805b(j).

This Court has endeavored to proceed in such a manner, and will continue to do so. In light of the recent filings, however, this Court can only observe that, to the extent there is concern about the delay in resolving this matter, the circumstances occasioning the delay, as set forth below, rest squarely with the government.

Background

This litigation concerns the acquisition of communications by the government pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended by the Protect America Act on August 5, 2007. Protect America Act of 2007, 121 Stat. 552.[1] Specifically, the United States, pursuant to 50 U.S.C. § 1805b(g), moved this Court on November 21, 2007, for an order to compel Yahoo to comply with [redacted] directives issued by the Director of National Intelligence and Attorney General on [redacted] 2007, pursuant to 50 U.S.C. 1805b(e).[2] Under 50 U.S.C. § 1805b(g), "[this] court shall issue an order requiring the person to comply with the directive if it finds that the directive was issued in accordance with [50 U.S.C. § 1805b(e)] and is otherwise lawful."

In accordance with a briefing schedule to which the parties agreed, Yahoo filed its Memorandum in Opposition to Motion to Compel on November 30, 2007 ("Memorandum in Opposition"), challenging the lawfulness of the directives on both statutory and constitutional grounds. Specifically, Yahoo argues: 1) the directives violate the Fourth Amendment; 2) the

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[1]Although the PAA has now expired, section 6(d) provides "authorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration." Protect America Act, 121 Stat. 552, §6(d) (Aug. 5, 2007).

[2]The directives at issue in this case were signed by the Acting Attorney General on [redacted] 2007, and by the Director of National Intelligence on [redacted] 2007.

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PAA violates the Separation of Powers and is otherwise flawed; and 3) the directives improperly implement the PAA.

On December 11, 2007, the government timely filed its Memorandum in Support of the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General ("Memorandum in Support"). In addition to responding to Yahoo's arguments on the merits of this case, the government for the first time argued that Yahoo lacked standing to assert the Fourth Amendment rights of its customers. Memorandum in Support, at 5-7. Accordingly, on December 14, 2007, the Court authorized further briefing on the issue of standing.[3] Yahoo then filed its sur-reply on December 21, 2007, and the government filed its reply to Yahoo's filing on January 4, 2008. Yahoo! Inc.'s Sur-reply in Opposition to Motion to Compel, Docket No. 105B(g) 07-01; Reply to Yahoo Inc.'s Sur-Reply, Docket No. 105B(g) 07-01.

The government's December 11, 2007 filing also included a motion requesting permission to file a classified appendix for the Court's ex parte and in camera review. Motion to File Classified Appendix, Docket No. 105B(g) 07-01.[4] The appendix contained, among other

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[3]The Court's Order directed Yahoo to file its brief addressing standing by December 28, 2007. On December 18, 2007, the government filed a Motion for Partial Reconsideration of Order Authorizing Sur-Reply to Motion to Compel, asking the Court to change Yahoo's deadline to December 21. Yahoo did not object to this change and the Court entered a Scheduling Order changing the deadline and, in response to a question raised by Yahoo concerning the scheduling of hearings, notified the parties that it did not anticipate holding a hearing prior to January 7, 2008. Scheduling Order, Docket No. 105B(g): 07-01, entered December 18, 2007.

[4]No certificate of service was filed with the Court indicating that the Motion to File Classified Appendix was served on Yahoo. Therefore, this Court ordered the government to serve the motion on Yahoo by January 2, 2008 or explain why the motion had not been served. Ex Parte Order, Docket No. 105B(g) 07-01, entered December 28, 2007. On January 2, 2008, the government filed a certificate of service indicating that it had served its motion, along with the Court's Ex Parte Order, on Yahoo on that same date.

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things, [redacted] together with related materials, such as affidavits, minimization procedures, and procedures for assessing the location of potential targets. The government's Memorandum in Support cited to the certifications and related materials in support of the government's argument that the directives to Yahoo at issue in this litigation comport with the Fourth Amendment. See, e.g., Memorandum in Support, at 13-20, fn12 (... "the government submits that the directives, the supporting certifications, affidavits, and procedures more than demonstrate the reasonableness of any acquisition pursuant to the directives"). On January 31, 2008, the Court granted the government's motion to file the appendix ex parte and in camera, relying upon 50 U.S.C. § 1805b(k), and noting that sufficient time had passed to allow Yahoo to object and that no objection had been filed. Order Authorizing Submission of Ex Parte Filing, Docket No. 105B(g) 07-01, entered January 31, 2008.

Recent Developments

On January 4, 2008, and February 6, 2008, this Court ordered the parties to brief various issues that were critical to the Court's consideration of the instant matter.[5] With the filing of the

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[5] The January 4, 2008 Order directed the government to file an affidavit, no later than January 16, 2008, addressing specific questions concerning the nature and scope of communications and information that Yahoo was required to provide under the directives and directed Yahoo to file an affidavit by January 23, 2008, either confirming the government's information or providing its own response to the questions posed.

The February 6, 2008 Order directed the parties to brief whether the directives to Yahoo would require Yahoo to assist the government in acquiring any class of communications or information in which a United States citizen would have a legitimate expectation of privacy under the Fourth Amendment. The Order also directed both parties to file their briefs by February 13, 2008. On February 7, 2008, Yahoo filed a motion seeking two additional days to file its brief, Motion for Extension of Time to File Supplemental Briefing, Docket No. 105B(g) 07-01and on February 8, 2008, the government opposed Yahoo's motion and sought, in the alternative, that any extension be granted to both parties. Opposition to Motion for Extension of Time to File Supplemental Briefing, Docket No. 105B(g) 07-01. The Court thereafter extended the deadline for both parties to February 15, 2008, and the briefs were timely filed. Order Granting Motion for Extension of Time to File Supplemental Briefing, Docket No. 105B(g) 07-01, entered Feb. 12, 2008.

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parties' Fourth Amendment briefs on February 15, 2008, this Court could have considered the record in this case to be complete. However, on February 6, 2008, the government had filed with the Foreign Intelligence Surveillance Court (FISC), under separate docket and not as part of the litigation in this matter, a document that was signed by the Director of National Intelligence on November 19, 2007, and by the Attorney General on December 14, 2007 that purported to amend DNI/AG Certification [redacted] by altering the minimization procedures used under that certification. Notice of Filing, In re DNI/AG 105B Certification [redacted] Then, on February 12, 2008, the government filed with the FISC, again under separate docket and not as part of the litigation in this matter, documents that purport to amend DNI/AG 105B Certifications [redacted] Each of these documents was signed by the Director of National Intelligence on January 30, 2008, and by the Attorney General on January 31, 2008. Finally, also on February 12, 2008, the government filed with the FISC, again under separate docket and not as part of the litigation in this matter, documents that purport to amend the procedures the government uses to determine that acquisitions conducted pursuant to the certifications do not concern persons reasonably believed to be located outside the United States, by adding new procedures by which the Federal Bureau of Investigation (FBI) makes such determinations. [redacted]

Despite the fact that these documents purported to amend documents that were included in the government's classified appendix that was filed on December 11, 2007, and relied upon by the government in its Memorandum in Support, the government failed to file these documents with this Court in this matter. In the absence of any explanation from the government, this Court, on February 15, 2008, ordered the government to explain whether the classified appendix that had previously been filed constituted the complete and up-to-date set of certifications and supporting documents that are applicable to the directives at issue in this proceeding. Ex Parte

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Order to the Government, Docket No. 105B(g): 07-01, entered February 15, 2008. The Order further directed the government, if the answer to this question was "no," to identify and file with the Court those documents it deems to be currently in effect and applicable to the directives to Yahoo that are at issue in this proceeding. In addition, the Order directed the government to serve copies of any such documents upon Yahoo, unless the government moved for leave to file its submission ex parte, in which case, the government was directed to serve a copy of its motion upon Yahoo, along with a copy of the Court's Order, unless the government established good cause not to include the Order.[6]

On February 20, 2008, the government informed the Court that the documents filed with the Court in this matter did not constitute the complete and up-to-date set of applicable certifications and supporting documents, and sought to supplement the record by filing a second classified appendix that contained the materials in the classified appendix filed on December 11, 2007, as well as the documents mentioned above that were filed with the FISC under separate docket, along with additional related documents that had never been filed with the FISC at all, under any docket. Response to Ex Parte Order to Government and Motion for Leave to File Classified Appendix for the Court's Ex Parte and in Camera Review, Docket No. 105B(g) 07-01, at 3 - 4, filed February 20, 2008.

Having at this stage of litigation provided this Court with a new set of certifications, procedures, and related materials that make substantive amendments to the documents upon which the government relied in briefs it has filed with this Court, the government, nonetheless, apparently believes everything should now be clear. ("Indeed, the extensive briefing on the legality of the directives that has taken place thus far in this litigation has covered the waterfront of legal issues at stake in this matter. Further briefing will only delay resolution of this important

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[6]On February 20, 2008, the government served upon Yahoo copies of the Court's Order and the government's response to the Order. Certificate of Service, Docket No. 105B(g) 07-01, filed Feb. 20, 2008.

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matter and prevent the government from obtaining compliance with its lawful directive." Opposition to Motion for Disclosure of Filings, at 7, fn. 2.) This Court does not share that view, as the government's most recent filings greatly complicate an already complex case. The execution by the government of "amendments" to certifications and the implementation of additional procedures present significant legal issues that are before the Court for the first time.

Further, the government's failure to file with this Court, until ordered to do so, materials that are directly relevant to issues central to this litigation is inexcusable. The government's actions have impeded the Court's consideration of this case in two respects. First, the government deprived the Court of the full record of relevant information. Second, the government's failure to provide any notice to this Court of the purported amendments to the certifications, and the intended effect of such "amendments" on previously issued directives, prevented the Court from immediately addressing the important legal issues newly presented by these "amendments." Moreover, the government's delay in filing these materials in separate dockets rendered it impossible for the Court, sua sponte, to inquire about the intended effect on this litigation of purported amendments until long after the first such "amendment" was executed.[7]

THEREFORE, IT IS HEREBY ORDERED,

The parties shall brief the following issues:

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[7]As discussed above, the first "amendment" had been signed by the Attorney General and the Director, National Intelligence by December 14, 2007, but was not filed with the FISC until February 6, 2008. The Court notes that the statute requires that "[t]he Attorney General shall transmit **as soon as practicable** under seal to the Court established under section 103(a) a copy of a certification made under subsection (a)." 50 U.S.C. § 1805b(c) (emphasis added).

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1) Does 50 U.S.C. § 1805b authorize the government to amend certifications? If the answer is no, then what is the impact of the filing of such amendments on this litigation?

2) Assuming the government can amend a certification under 50 U.S.C. § 1805b, is the issuance of an amended certification tantamount to the issuance of a new certification?

3) Can the government rely on a pre-existing directive if it amends a certification, or does it need to issue a new directive pursuant to the amended certification? Does the answer depend upon the nature of the amendment?

4) If the government can amend certifications without issuing new directives, then how can the recipient of a directive obtain meaningful judicial review of the legality of the directive?

5) Assuming the government can amend a certification under certain circumstances, can it do so for the purpose of instituting new procedures for determining that the acquisition concerns persons reasonably believed to be located outside the United States or for the purpose of changing the underlying minimization procedures?

6) Can the government submit new procedures to this Court for review under 50 U.S.C. § 1805c more than 120 days after the effective date of the Protect America Act, but prior to the annual update envisioned by the statute?

IT IS FURTHER ORDERED,

The government shall file its brief no later than Friday, March 7, 2008 and shall serve such brief on Yahoo on Tuesday, March 11, 2008.

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The Court is issuing this Order ex parte to allow the government an opportunity to notify the Court whether it objects to Yahoo being served with this Order. The Court will cause this Order to be served on Yahoo on Tuesday, March 4, 2008, unless, before then, the government files an objection with the Court, showing good cause why Yahoo should not be directed to brief these issues or be informed of such briefing by the government.

If served with this Order, Yahoo shall file its brief no later than Tuesday, March 11, 2008.

IT IS SO ORDERED, this 29th day of February 2008.

REGGIE B. WALTON
Judge, United States Foreign Intelligence
Surveillance Court

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the original. [redacted]

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

-3 PM 7: 13
KAREN SUTTON
CLERK

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

GOVERNMMENT'S EX PARTE NOTICE OF
OBJECTIONS AND STATEMENT OF GOOD CAUSE (U)

The United States of America, through the undersigned Department of Justice attorneys, and for good cause as more specifically described below, respectfully objects to Yahoo! Inc. ("Yahoo") being served with the Court's Order Directing Further Briefing on the Protect America Act and to Yahoo being directed to brief the issues raised in the Court's Order or otherwise informed of such briefing by the government. ~~(S)~~

Before addressing this question, however, the government respectfully informs the Court that it appreciates the concerns set forth in its February 29, 2008 Order and takes responsibility for the omissions and mistakes that gave rise to those concerns. The government will ensure that such problems do not occur in the future. By way of explanation, the government did not appreciate that the amended certifications and

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 3 March 2033~~

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related procedures that were filed with the Court pursuant to 50 U.S.C. § 1805B(c) were not also part of the record under this docket, and therefore did not provide notice of such amendments in this litigation. The government further acknowledges that it should have filed one of the amended certifications in a more timely manner. It was not the government's intent to impede the Court's resolution of this matter in any way, and the government regrets the difficulties it has caused the Court. ~~(S)~~

BACKGROUND (U)

This proceeding concerns the lawfulness of directives issued to Yahoo for the collection of foreign intelligence information under provisions of the Protect America Act of 2007 ("Protect America Act"), which amended the Foreign Intelligence Surveillance Act of 1978, as amended ("FISA" or "the Act"). On November 21, 2007, the government filed a motion pursuant to section 1805B(g) to compel Yahoo's compliance with [redacted] directives issued to Yahoo by the Director of National Intelligence and the Attorney General pursuant to section 1805B(e) of the Act.[1] ~~(S)~~

[1] The directives at issue in this matter were signed by the Acting Attorney General on [redacted] 2007, and the Director of National Intelligence on [redacted] 2007. Each directive to Yahoo stated, *inter alia*, that "[t]he Government wil[redacted] ~~(S)~~

On January 31, 2008, the Court granted the government's motion to file a classified appendix that the government filed on December 11, 2007 ("December 2007 Classified Appendix"). Moreover, on February 28, 2008 ("February 28, 2008 Order"), the Court granted the government's motion for leave to file the classified appendix filed on February 20, 2008, denied

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On December 14, 2007, the first amendment to Certification [redacted] was executed. See DNI/AG 105B Certification [redacted] Amendment 1. (C.A. 114-33.) As explained in that amended certification and supporting documents, the Central Intelligence Agency (CIA) requested to receive unminimized communications acquired by the National Security Agency (NSA) pursuant to Certification [redacted] (C.A. 122-23.) The CIA also proposed minimization procedures that it would use with respect to its receipt of such unminimized communications from NSA. (C.A. 124-33.) The original NSA minimization procedures approved for use under Certification [redacted] did not provide for the NSA to disseminate such unminimized communications to the CIA, and the NSA therefore proposed amending those procedures to permit such dissemination. (C.A. 97, 121.) Accordingly, the Director of National Intelligence and the Attorney General

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Yahoo's request for access to that classified appendix, ordered that both of the classified appendices remain part of the record before the Court, and denied Yahoo's request for access to the Court's Memorandum Opinion and Order dated [redacted] approving the government's use of certain targeting procedures under the Protect America Act, [redacted] ("Procedures Opinion").

The government notes that on February 15, 2008, the Attorney General and Director of National Intelligence executed DNI/AG 105B Certification 08-01. That certification, as well as the procedures by which the government determines that acquisitions conducted pursuant to that do not constitute electronic surveillance, were filed with this Court on March 3, 2008. As stated in the notices of filing accompanying those documents, the government does not at this time anticipate that this certification and any documents related thereto will be made a part of this litigation. ~~(S)~~

The citations to "C.A. __" herein refer to the page number of the document in the Classified Appendix filed by the government on February 20, 2008. ~~(S)~~

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- certified that the amended minimization procedures to be used by NSA, and the minimization procedures to be used by CIA with respect to its receipt of unminimized communications under Certificatio[redacted]met the definition of minimization procedures under section 101(h) of the Act. (C.A. 114-18.) Because of the limited nature of this first amendment to DNI/AG 105B Certification[redacted]the government did not issue a new directive to Yahoo or to any other provider. In particular, the first amendment did not change any provision or statement that appears in the original directive served on Yahoo pursuant to Certification[redacted]~~(TS//SI//NF)~~

On January 31, 2008, the Director of National Intelligence and the Attorney General executed amendments to Certificatio[redacted] See DNI/AG 105B Certificatio[redacted] As explained in the amended certifications and supporting documents, NSA requested, in accordance with Executive Order 12333, section 1.14(c), that the Federal Bureau of Investigation (FBI) acquire foreign intelligence informatio[redacted]concerning persons reasonably believed to be outside the United States.[redacted]The FBI therefore sought authorization to acquire such communications pursuant to the above-referenced certifications. Id. In conjunction with these requests, the FBI proposed procedures that they would use to determine that the acquisition concerns persons reasonably believed to be located outside the United States. [redacted]

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[redacted] The FBI further proposed minimization procedures to apply to [redacted] it acquired pursuant to the requested authorization. [redacted] ~~(S)~~

As further explained in the amended certifications and supporting documents, the NSA requested the FBI to convey such [redacted] to the NSA in unminimized form. [redacted] The original NSA minimization procedures approved for use under Certification [redacted] did not provide for the processing of such [redacted] received from the FBI. [redacted] Thus, the NSA proposed amending those minimization procedures in order to provide for the processing of such [redacted] The NSA further proposed that if directed by NSA, the FBI would also convey such [redacted] to the CIA in unminimized form, which would process such communications in accordance with minimization procedures proposed by the CIA. [redacted] ~~(TS//SI//NF)~~

Accordingly, the Director of National Intelligence and the Attorney General determined, *inter alia,* that there were reasonable procedures in place for the FBI to determine that its acquisition of foreign intelligence information [redacted] concerns persons reasonably believed to be located outside the United

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States,[2] and that the minimization procedures to be used by the FBI, NSA, and CIA under these amended certifications met the definition of minimization procedures under 101(h) of the Act. [redacted] Due to the nature of these amendments, the government did not issue a new directive to Yahoo[3] or to any other provider. In particular, the directives at issue in this litigation, as served on Yahoo prior to the commencement of this litigation, expressly direct Yahoo to provide the government [redacted] ~~(S)~~

GOVERNMENT'S STATEMENT OF GOOD CAUSE

For the following reasons, the government objects to Yahoo being served with the 29 February Order and believes Yahoo should not be directed to brief the issues contained therein. Yahoo's involvement would neither assist the Court in resolving the questions raised in its Order nor contribute to the Court's consideration of the core Fourth Amendment questions in this litigation. ~~(S)~~

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[2] The procedures by which the NSA determines that its acquisition of foreign intelligence information under those certifications concerns persons reasonably believed to be located outside the United States were not altered by these amendments in any way. ~~(S)~~

[3] In particular, the government notes that the directives at issue in this litigation expressly direct Yahoo to provide "the Government" [redacted] ~~(S)~~

I. SERVING THE COURT'S ORDER AND DIRECTING YAHOO TO BRIEF THE ISSUES WOULD REVEAL INFORMATION DIRECTLY RELATED TO THE GOVERNMENT'S EX PARTE FILING AND WOULD NOT ASSIST THE COURT IN RESOLVING THE QUESTIONS RAISED IN ITS ORDER. (S)

On February 28, 2008, this Court permitted the government to file ex parte all of the documents related to the certification amendments addressed in the Court's 29 February Order. See supra at 4 n.2. The Court also denied Yahoo's motion for the release of the Procedures Opinion, which was based in large measure on information contained in the government's December 2007 classified appendix. In denying Yahoo's motion for the Procedures Opinion, the Court explained that "the Congressional judgment embodied in [section 1805B(k)] does suggest that this Court should not lightly override the government's opposition to the release of additional classified information in this litigation, particularly where, as here, that information directly relates to what the government has submitted for ex parte and in camera review under section 1805b(k)." Order of February 28, 2008, at 2 n. 2. See, e.g., Taglianetti v. United States, 394 U.S. 316, 317-18 (1969) (determining that "an adversary proceeding and full disclosure [is not required] for resolution of every issue raised by an electronic surveillance" and finding that such a task was not "too complex . . . to rely wholly on the in camera judgment of the trial court"). (S)

The same is true in this instance. The Court's 29 February Order directed the parties to brief certain issues concerning the government's ability to amend certifications and related documents under the Protect America Act. As such, the

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29 February Order "directly relates to what the government has submitted for ex parte and in camera review under section 1805b(k)"—namely, the amended certifications and related documents included in February 2008 classified appendix. Any response to questions raised in the Court's order may turn, at least in part, on some discussion of the nature of the amendments made by the Government. For example, the Court's Order questions whether the government needs to issue a new directive pursuant to amended certifications and queries whether the answer "depend[s] upon the nature of the amendment." It would be difficult, if not impossible, for Yahoo to answer such a question without knowledge of the underlying certifications and amendments. ~~(S)~~

Because of the close link between the materials contained in the classified appendix and the questions raised by the Court in the 29 February Order, allowing Yahoo review the 29 February Order, and directing Yahoo to brief the issues raised therein would undermine the benefits provided by the statutorily authorized ex parte and in camera filing and review mechanism contained in 50 U.S.C. § 1805B(k), as well as this Court's order denying Yahoo access to the Government's classified appendix filed pursuant to this provision with little benefit to the Court's consideration of the questions raised in its Order. See Order dated February 28, 2008. ~~(S)~~

II. SERVING THE 29 FEBRUARY ORDER ON YAHOO AND DIRECTING YAHOO TO BRIEF THE ISSUES RAISED IN THE 29 FEBRUARY ORDER WOULD CONTRIBUTE LITTLE, IF ANYTHING, TO THE RESOLUTION OF THE CORE FOURTH AMENDMENT ISSUES IN THIS LITIGATION. (S)

In addition, and as more fully discussed below, allowing Yahoo to brief the issues raised in the Court's 29 February Order would contribute little, if anything, to the resolution of the core Fourth Amendment issues in this litigation. As a first-order matter, it is important to note that because Yahoo is not privy to the certifications or the amendments, Yahoo has no material stake in the Court's consideration of questions related only to those documents. In particular, this is the case because the certifications and amendments do not materially affect any of the arguments in the parties' briefs on the merits.

The amendments made by the certification simply enable the government to more comprehensively implement acquisition activities already authorized under the original certifications and directives, and to provide for broader dissemination, in accordance with additional minimization procedures that meet statutory requirements, of the valuable foreign intelligence information the government expects to acquire. Indeed, as the government will demonstrate, many of the changes brought about by these certification amendments further strengthened the already significant protections contained in the original certifications and related documents. Nonetheless, it is important to note that the government does not rely on these amendments in any of its filings, nor does it seek further briefing to bolster its Fourth Amendment arguments

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based on the more stringent protections provided by the amended certifications and procedures. As such, Yahoo would not be disadvantaged with respect to the resolution of the merits of this litigation if it is not served with the 29 February Order or directed to brief the issues contained therein. ~~(S)~~

For example, on January 31, 2008, DNI/AG 105B Certificatio[redacted]were amended to authorize the FBI to acquire foreign intelligence informatio[redacted]concerning persons reasonably believed to be located outside the United States. As noted above, the directives that had been issued to Yahoo in connection with those certifications prior to these amendments already expressly direct Yahoo to provide "the Government"[redacted] ~~(S)~~

Moreover, in amending these certifications to authorize the FBI to acquire foreign intelligence information[redacted]the Attorney General and the Director of National Intelligence found reasonable the procedures to be used by the FBI in determining that such acquisition concerns persons reasonably believed to be located outside the United States. These additional procedures supplement -- and in fact can be used only in tandem with -- the NSA procedures that the Attorney General and Director of National Intelligence approved when the original certifications were

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executed.[4] Indeed, the FBI procedures approved for use under the amended certifications further enhance the already significant safeguards present in the original certifications by creating an additional process through which determinations made by the NSA under its own procedures will be subjected to further review by the FBI. In any event, this Court has recognized that issues concerning such procedures are only "tangential to the major issues in this case." See Order of February 28, 2008, at 2 n.2. Therefore, providing Yahoo with an opportunity to brief any issues arising from the government's use of these additional procedures approved for use under the amended certifications would contribute little, if anything, to the resolution of the Fourth Amendment issues raised by Yahoo in this litigation. ~~(S)~~

The amended certifications also made refinements to existing minimization procedures already approved for use under the original certifications, as well as approved the use of additional minimization procedures. Indeed, the amended certifications executed on January 31, 2008, effected a change to the minimization procedures that was made in direct response to concerns that the Court raised about the NSA minimization procedures approved for use under the original certifications. See, e.g., DNI/AG 105B Certification 07-01, Amendment 1, Exhibit B, at 4 (providing that "[a]ny communications acquired through the targeting of a person who at the time of targeting is reasonably believed to be located outside the United States but is in fact

[4] In the Procedures Order, this Court approved the continued use of these NSA procedures. ~~(S)~~

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located inside the United States at the time such communications are acquired shall be destroyed upon recognition" unless certain conditions are met); Transcript of Proceedings Before Hon. Judge Colleen Kollar-Kotelly, United States FISC Judge, at 25 (Dec. 12, 2007).

Further, in executing the amended certifications that effected this change, the Attorney General and Director of National Intelligence certified that these amended minimization procedures meet the definition of minimization procedures in section 101(h) of the Act. Therefore, providing Yahoo with an opportunity to brief any issues arising from this amendment of the minimization procedures would contribute little, if anything, to the resolution of the Fourth Amendment issues raised by Yahoo in this litigation. ~~(S)~~

The government anticipates more fully briefing why the changes effected by the amended certifications have no bearing on the Fourth Amendment issues raised by Yahoo in this litigation. Nevertheless, the government respectfully submits that the foregoing further establishes good cause why Yahoo should not be directed to brief the issues raised in the Court's 29 February Order or be informed of the government's briefing of such issues. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully objects to Yahoo being served with the Court's 29 February Order and to Yahoo being directed to brief the issues raised therein or informed of such briefing by the government. (S)

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General

John C. Demers
Deputy Assistant Attorney General

[redacted]
Counsel to the Assistant Attorney General

[redacted]
Associate Counsel
Office of Intelligence Policy and Review

[redacted]
Attorney Advisors
Office of Intelligence Policy and Review

[redacted]
Counsel for National Security Law & Policy
Office of Law and Policy

National Security Division
U.S. Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g)-07-01

CERTIFICATE OF FILING (U)

I hereby certify that, on March 3, 2008, true and correct copies of the Government's Ex Parte Notice of Objections and Statement of Good Cause were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for filing with the Foreign Intelligence Surveillance Court. (S)

Respectfully submitted,

[redacted]

Derived From: Notice to the USFISC in Docket Number captioned above
Declassify on: 3 March 2033

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (~~S~~)

Docket Number 105B(g): 07-01

ORDER

DIRECTING FURTHER BRIEFING ON THE PROTECT AMERICA ACT

On February 29, 2008, the Court issued an ex parte Order, directing the government to submit a brief, no later than Friday, March 7, 2008, addressing a number of specific questions concerning the Protect America Act. In addition, the Court informed the government that the Court would cause its Order to be served on Yahoo!, Inc. (Yahoo) on Tuesday, March 4, 2008, unless the government showed good cause why the Court should not do so. The government timely filed an ex parte Notice of Objections and Statement of Good Cause.

In consideration of the government's concerns, the Court will not serve its February 29 Order on Yahoo. However, in the interests of justice and to ensure that the Court receives full briefing on the statutory questions it has raised,

THE COURT HEREBY ORDERS,

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that Yahoo shall submit a brief that addresses the following questions:

1) Does 50 U.S.C. § 1805b authorize the government to amend certifications? If the answer is no, then what is the impact of the filing of such amendments on this litigation?

2) Assuming the government can amend a certification under 50 U.S.C. § 1805b, is the issuance of an amended certification tantamount to the issuance of a new certification?

3) Can the government rely on a pre-existing directive if it amends a certification, or does it need to issue a new directive pursuant to the amended certification? Does the answer depend upon the nature of the amendment?

4) If the government can amend certifications without issuing new directives, then how can the recipient of a directive obtain meaningful judicial review of the legality of the directive?

5) Assuming the government can amend a certification under certain circumstances, can it do so for the purpose of instituting new procedures for determining that the acquisition concerns persons reasonably believed to be located outside the United States or for the purpose of changing the underlying minimization procedures?

6) Can the government submit new procedures to this Court for review under 50 U.S.C. § 1805c more than 120 days after the effective date of the Protect America Act, but prior to the annual update envisioned by the statute?

To ensure that both parties are provided the same amount of time to brief these issues, Yahoo shall submit and serve its brief no later than Wednesday, March 12, 2008.

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IT IS FURTHER ORDERED,

The government shall serve Yahoo with its brief, redacted as necessary, on Wednesday, March 12, 2008.

IT IS SO ORDERED, this 5th day of March 2008.

REGGIE B. WALTON

Judge, United States Foreign Intelligence Surveillance Court

I, Karen E. Sutton, Clerk, FISC, certify that this document is a true and correct copy of the original.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g) 07-01

EX PARTE MOTION FOR LEAVE TO FILE CLASSIFIED INFORMATION FOR THE COURT'S EX PARTE AND IN CAMERA REVIEW (U)

The United States of America, through the undersigned Department of Justice attorneys, hereby moves this Court for leave to file the attached classified information pursuant to section 105B(k) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act). The grounds for the motion are as follows: (S)

1. On November 21, 2007, the government filed a motion pursuant to section 105B(g) to compel Yahoo's compliance with [redacted] directives issued to Yahoo Inc. ("Yahoo") by the Director of National Intelligence and the Attorney General pursuant to section 105B(e) of the Act. (S)

Classified by:	Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason:	1.4 (c)
Declassify on:	14 March 2033

2. On December 11, 2007, the government filed with the Court a Memorandum in Support of the Government's Motion to Compel Compliance with the Directives of the Director of National Intelligence and Attorney General ("Gov't Mem."). The government attached as an exhibit to the Memorandum excerpts of the "Department of Defense Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons," DoD 5240.1-R, Proc. 5, Pt.2.C ("DoD Procedures"). The government also discussed the DoD Procedures in its Memorandum for the sole purpose of describing the findings the Attorney General must make to authorize acquisition against a U.S. person overseas pursuant to section 2.5 of Executive Order 12333. See Gov't Mem. at 15-16. ~~(S)~~

3. On January 3, 2008, the Attorney General signed the "Department of Defense Supplemental Procedures Governing Communications Metadata Analysis," which purported to supplement the DoD Procedures ("Supplement to DoD Procedures"), a copy of which is attached hereto as Exhibit A. The Supplement to DoD Procedures concerns the analysis of communications metadata that has already been lawfully acquired by DoD components, including the National Security Agency (NSA). Specifically, the Supplement to DoD Procedures clarifies that NSA may analyze communications metadata associated with U.S. persons and persons believed to be in the United States. The Supplement to DoD Procedures does not relate to the findings the Attorney General must make to authorize acquisition against a U.S. person overseas

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pursuant to section 2.5 of Executive Order 12333. The minimization procedures approved for use under each of the certifications contain no restrictions that would prohibit NSA from conducting the analysis of communications metadata acquired under the certifications. NSA will continue to comply with those minimization procedures, including with any restrictions on the dissemination of information. (S//SI//OC,NF)

4. This motion constitutes the government's request under section 105B(k) that the Court review ex parte and in camera the classified information attached hereto as Exhibit A.[1] The government has styled this request as a motion for leave to file classified material, although section 105B(k) speaks in mandatory terms, providing that "the court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information." (S)

5. Because the government is filing this motion ex parte and because the motion contains information for which Yahoo's counsel does not have the appropriate clearances nor the need-to-know, it has only provided Yahoo with a notice of filing

[1] The government recognizes that portions of the Protect America Act recently ceased to have effect. This fact does not affect this litigation or this motion, however, because section 6(d) of the Protect America Act (which is not subject to the sunset contained in section 6(c) of the Protect America Act) provides that "[a]uthorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration." Further, this Court's authority to enforce such directives under section 105B(g), as well as the government's ability to file the attached classified appendix under section 105B(k), are unaffected because Section 6(d) provides, in relevant part, that "[s]uch acquisitions shall be governed by the applicable provisions of such amendments." (S)

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regarding this motion and does not intend to provide the motion or the attached classified information to Yahoo. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully requests that the Court review the classified information attached hereto as Exhibit A ex parte and in camera. A proposed Order is attached hereto. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General

[redacted]
Associate Counsel
Office of Intelligence Policy and Review

[redacted]
Attorney Advisors
Office of Intelligence Policy and Review

National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

The United States, pursuant to section 105B(g) of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA or the Act), has moved this Court for an order compelling Yahoo Inc. to comply with [redacted] directives issued by the Director of National Intelligence and Attorney General pursuant to section 105B(e) of the Act. Pursuant to section 105B(k) of the Act, the United States now requests leave to file classified information for ex parte and in camera review by the Court, and it appearing that such motion should be granted,

IT IS HEREBY ORDERED, pursuant to the authority conferred on this Court by the Act, that the motion of the United States is GRANTED, and it is

~~Classified by:~~	Matthew G. Olsen, Deputy ~~Assistant~~ Attorney General, ~~NSD~~, DOJ
Reason:	1.4 (c)
Declassify on:	14 March 2033

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FURTHER ORDERED that the classified information submitted by the government in the above-captioned matter is accepted for ex parte and in camera review by the Court.

Signed ______________________________ E.T.
Date   Time

____
REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

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~~(S//SI)~~ Department of Defense Supplemental Procedures Governing Communications Metadata Analysis

Sec. 1: Purpose

~~(S//SI)~~ These procedures supplement the Procedures found in DoD Regulation 5240.1-R and the Classified Annex thereto. These procedures govern NSA's analysis of data that it has already lawfully collected and do not authorize collection of additional data. These procedures also clarify that, except as stated in section 3 below, the Procedures in DoD Regulation 5240.1-R and the Classified Annex thereto do not apply to the analysis of communications metadata.

Sec. 2: Definitions

~~(S//SI)~~ Communications metadata means the dialing, routing, addressing, or signaling information associated with a communication, but does not include information concerning the substance, purport or meaning of the communication. The two principal subsets of communications metadata are telephony metadata and electronic communications metadata.

(a) Telephony "metadata" includes the telephone number of the calling party, the telephone number of the called party, and the date, time, and duration of the call. It does not include the substance, purport, or meaning of the communication.

(b) For electronic communications, "metadata" includes the information appearing on the "to," "from," "cc," and "bcc" lines of a standard e-mail or other electronic communication. For e-mail communications, the "from" line contains the e-mail address of the sender, and the "to," "cc," and "bcc" lines contain the e-mail addresses of the recipients. "Metadata" also means (1) information about the Internet-protocol (IP) address of the computer from which an e-mail or other electronic communication was sent and, depending on the circumstances, the IP address of routers and servers on the Internet that have handled the communication during transmission; (2) the exchange of an IP address and e-mail address that occurs when a user logs into a web-based e-mail service; and (3) for certain logins to web-based e-mail accounts, inbox metadata that is transmitted to the user upon accessing the account. "Metadata" associated with electronic communications does not include information from the "subject" or "re" line of an e-mail or information from the body of an e-mail.

~~Derived From: NSA/CSSM 1-52~~
~~Dated: 20041123~~
~~Declassify On: 20291123~~

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~~(S//SI)~~ Contact chaining. Contact chaining is a process by which communications metadata is organized. It shows, for example, the telephone numbers or e-mail addresses that a particular telephone number or e-mail address has been in contact with, or has attempted to contact. Through this process, computer algorithms automatically identify not only the first tier of contacts made by the seed telephone number or e-mail address, but also the further contacts made by the first tier of telephone numbers or e-mail addresses and so on.

Sec. 3: Procedures

(a) ~~(S//SI)~~ NSA will conduct contact chaining and other communications metadata analysis only for valid foreign intelligence purposes.

(b) ~~(S//SI)~~ NSA will disseminate the results of its contact chaining and other analysis of communications metadata in accordance with current procedures governing dissemination of information concerning US persons. *See* Section 4.A.4 of the Classified Annex to Procedure 5 of DoD Regulation 5240.1-R.

(c) (U//~~FOUO~~) Any apparent misuse or improper dissemination of metadata shall be investigated and reported to appropriate oversight organization(s). *See* Procedure 15 of DoD Regulation 5240.1-R.

Sec. 4: Clarification

~~(S//SI)~~ For purposes of Procedure 5 of DoD Regulation 5240.1-R and the Classified Annex thereto, contact chaining and other metadata analysis do not qualify as the "interception" or "selection" of communications, nor do they qualify as "us[ing] a selection term," including using a selection term "intended to intercept a communication on the basis of . . . [some] aspect of the content of the communication."

Dr. Robert Gates
Secretary of Defense

10-19-07
Date

Approved by:

Michael B. Mukasey
Attorney General
of the United States

1/3/08
Date

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g)-07-01

NOTICE OF FILING (U)

Notice is hereby given that on March 14, 2008, the Government filed an Ex Parte Motion for Leave to File Classified Information for the Court's Ex Parte and In Camera Review pursuant to section 105B(k) of the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned matter. (S)

[redacted]

Attorney Advisors
National Security Division
U.S. Department of Justice

Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 13 March 2033

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on March 14, 2008, a true and correct copy of the attached Notice of Filing was submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]

Attorney Advisors
National Security Division
U.S. Department of Justice

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[redacted]

~~SECRET~~

DATE 9/10/08

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, and Rule 7(b) of the Rules of Procedure of this Court, to unseal the following documents filed in the above-captioned matter: (1) the United States of America's Supplemental Brief on the Fourth Amendment (filed February 15, 2008); (2) Yahoo! Inc.'s ("Yahoo") Supplemental Briefing on Fourth Amendment Issues (filed February 15, 2008); (3) the Government's Response to the Court's Order of February 29, 2008 (filed March 7, 2008); and (4) Yahoo's Supplemental Briefing on Protect America Act Statutory Issues (filed March 19, 2008). The

~~SECRET~~

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 14 April 2033~~

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Government assumes for purposes of this motion that the documents are records of the Court pursuant to Rule 7(b). ~~(S)~~

Pursuant to Section 4 of the recently enacted Protect America Act, the Attorney General on a semiannual basis must inform specified congressional committees of "incidents of noncompliance by a specified person to whom the Attorney General and Director of National Intelligence issue a directive." Protect America Act of 2007, Pub. L. No. 110-95, § 4(1)(B), 121 Stat. 552, 555-56 (2007). In connection with this requirement, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate were briefed on the status of the decision of Yahoo not to comply with directives issued under the Protect America Act. On December 14, 2007, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate requested access to briefing in connection with the consideration of proposed legislation to amend the Foreign Intelligence Surveillance Act of 1978. ~~(S)~~

In response to this request, the Government has previously moved the Court to unseal the following documents: (1) the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (filed November 21, 2007); (2) Yahoo's Memorandum in Opposition to Motion to Compel (filed November 30, 2007); (3) the Memorandum in Support of the Government's

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Motion to Compel (filed December 11, 2007); (4) Yahoo's Sur-Reply Brief (filed December 21, 2007) and (5) the Government's Reply to Yahoo's Sur-Reply (filed January 4, 2008). The Court approved the unsealing of these documents by Orders dated January 10 and 17, 2008. (S)

Staff members recently requested access to more recent briefing in the above-captioned matter. Accordingly, the Government now moves the Court to unseal the following documents: (1) the United States of America's Supplemental Brief on the Fourth Amendment (filed February 15, 2008); (2) Yahoo's Supplemental Briefing on Fourth Amendment Issues (filed February 15, 2008); (3) the Government's Response to the Court's Order of February 29, 2008 (filed March 7, 2008); and (4) Yahoo's Supplemental Briefing on Protect America Act Statutory Issues (filed March 19, 2008).

On April 16, 2008, counsel for Yahoo informed the Government that Yahoo does not oppose the relief sought provided that: (i) the above-referenced documents are unsealed for the limited purpose of allowing the Government to disclose and submit them to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives; and (ii) prior to such disclosure, the Government will redact from the

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above-referenced documents the name of Yahoo and all other references that would disclose the identity of Yahoo. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the documents identified above. An agreed proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]
Attorney Advisors
National Security Division
United States Department of Justice

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America pursuant to Rule 7(b) of the Rules of Procedure of this Court in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the United States of America's Supplemental Brief on the Fourth Amendment (filed February 15, 2008), (2) Yahoo! Inc.'s ("Yahoo") Supplemental Briefing on Fourth Amendment Issues (filed February 15, 2008), (3) Government's Response to the Court's Order of February 29, 2008 (filed March 7, 2008), and (4) Yahoo's Supplemental Briefing on Protect America Act Statutory Issues (filed March 19, 2008) (hereinafter collectively

Derived From: Motion to the USFISC in Docket Number captioned above
Declassify on: 14 April 2033

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"the Briefs"), which were filed pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Briefs to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Briefs shall remain sealed.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Briefs, redact from the Briefs the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

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cc:

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on April 16, 2008, true and correct copies of the United States of America's Unopposed Motion to Unseal Record, with proposed order, and this Certificate of Service were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

Respectfully submitted,

[redacted]

Attorney Advisor
National Security Division
U.S. Department of Justice

~~Derived From:~~ Motion to the USFISC ~~in Docket Number captioned above~~
~~Declassify on:~~ 14 April 2033

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

Filed [redacted]
CSO
DATE: 7-16-08

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, and Rule 7(b) of the Rules of Procedure of this Court, to unseal the following documents filed in the above-captioned matter: (1) the United States of America's Supplemental Brief on the Fourth Amendment (filed February 15, 2008); (2) Yahoo! Inc.'s ("Yahoo") Supplemental Briefing on Fourth Amendment Issues (filed February 15, 2008); (3) the Government's Response to the Court's Order of February 29, 2008 (filed March 7, 2008); and (4) Yahoo's Supplemental Briefing on Protect America Act Statutory Issues (filed March 19, 2008). The

Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 14 April 2033

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Government assumes for purposes of this motion that the documents are records of the Court pursuant to Rule 7(b). ~~(S)~~

Pursuant to Section 4 of the recently enacted Protect America Act, the Attorney General on a semiannual basis must inform specified congressional committees of "incidents of noncompliance by a specified person to whom the Attorney General and Director of National Intelligence issue a directive." Protect America Act of 2007, Pub. L. No. 110-95, § 4(1)(B), 121 Stat. 552, 555-56 (2007). In connection with this requirement, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate were briefed on the status of the decision of Yahoo not to comply with directives issued under the Protect America Act. On December 14, 2007, staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate requested access to briefing in connection with the consideration of proposed legislation to amend the Foreign Intelligence Surveillance Act of 1978. ~~(S)~~

In response to this request, the Government has previously moved the Court to unseal the following documents: (1) the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General (filed November 21, 2007); (2) Yahoo's Memorandum in Opposition to Motion to Compel (filed November 30, 2007); (3) the Memorandum in Support of the Government's

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Motion to Compel (filed December 11, 2007); (4) Yahoo's Sur-Reply Brief (filed December 21, 2007) and (5) the Government's Reply to Yahoo's Sur-Reply (filed January 4, 2008). The Court approved the unsealing of these documents by Orders dated January 10 and 17, 2008. ~~(S)~~

Staff members recently requested access to more recent briefing in the above-captioned matter. Accordingly, the Government now moves the Court to unseal the following documents: (1) the United States of America's Supplemental Brief on the Fourth Amendment (filed February 15, 2008); (2) Yahoo's Supplemental Briefing on Fourth Amendment Issues (filed February 15, 2008); (3) the Government's Response to the Court's Order of February 29, 2008 (filed March 7, 2008); and (4) Yahoo's Supplemental Briefing on Protect America Act Statutory Issues (filed March 19, 2008).

On April 16, 2008, counsel for Yahoo informed the Government that Yahoo does not oppose the relief sought provided that: (i) the above-referenced documents are unsealed for the limited purpose of allowing the Government to disclose and submit them to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives; and (ii) prior to such disclosure, the Government will redact from the

above-referenced documents the name of Yahoo and all other references that would disclose the identity of Yahoo. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the documents identified above. An agreed proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America pursuant to Rule 7(b) of the Rules of Procedure of this Court in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the United States of America's Supplemental Brief on the Fourth Amendment (filed February 15, 2008), (2) Yahoo! Inc.'s ("Yahoo") Supplemental Briefing on Fourth Amendment Issues (filed February 15, 2008), (3) Government's Response to the Court's Order of February 29, 2008 (filed March 7, 2008), and (4) Yahoo's Supplemental Briefing on Protect America Act Statutory Issues (filed March 19, 2008) (hereinafter collectively

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 14 April 2033~~

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"the Briefs"), which were filed pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Briefs to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Briefs shall remain sealed.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Briefs, redact from the Briefs the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed April 22, 2008 2:10 p.m. Eastern Time
Date Time

REGGIE B. WALTON
Judge, United States Foreign
Intelligence Surveillance Court

[redacted]
[illegible]
[illegible] [redacted]
the original.

cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W., Suite 600 East Tower
Washington, D.C. 20005
Counsel for Yahoo Inc.

Matthew G. Olsen
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950 Pennsylvania Avenue, N.W.
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Counsel for the United States

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, to unseal the following documents in the above-captioned matter: (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"). The Order provides that the Order and Opinion "are sealed and shall not be disclosed by either party without authorization by this Court." ~~(S)~~

Pursuant to Section 4 of the Protect America Act, the Attorney General on a semiannual basis must inform specified congressional committees of "incidents of noncompliance by a specified person to whom the Attorney General and Director of

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 28 April 2033~~

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National Intelligence issue a directive." Protect America Act of 2007, Pub. L. No. 110-95, § 4(1)(B), 121 Stat. 552, 555-56 (2007). In connection with this requirement, staff members of the Select Committee on Intelligence of the Senate and the Committee on the Judiciary of the Senate were briefed on the status of the decision of Yahoo Inc. ("Yahoo") not to comply with directives issued under the Protect America Act. Staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate since have requested access to briefing in connection with the consideration of proposed legislation to amend the Foreign Intelligence Surveillance Act of 1978. ~~(S)~~

In response to these requests, the Government has previously moved the Court to unseal the certain pleadings filed by the Government and Yahoo. The Court approved the unsealing of those documents by orders dated January 10 and 17, 2008, and April 22, 2008. ~~(S)~~

The Government now intends to inform the specified congressional committees of the Court's resolution of the above-captioned matter and to provide copies of the Order and Opinion. The Government, accordingly, moves to unseal the Order and Opinion. ~~(S)~~

On April 29, 2008, counsel for Yahoo informed the Government that Yahoo does not oppose the relief sought provided that: (i) the Order and Opinion are unsealed for

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the limited purpose of allowing the Government to disclose and submit them to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives; and (ii) prior to such disclosure, the Government will redact from the above-referenced documents the name of Yahoo and all other references that would disclose the identity of Yahoo. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the documents identified above. An unopposed proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]

National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"), which were issued pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the Order and Opinion to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 28 April 2033~~

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Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the Order and Opinion shall remain sealed until further order of the Court.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Order and Opinion, redact from the Order and Opinion the name of Yahoo Inc. ("Yahoo") and all other references that would disclose the identity of Yahoo.

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

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cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W., Suite 600 East Tower
Washington, D.C. 20005
Counsel for Yahoo Inc.

Matthew G. Olsen
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Counsel for the United States

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on April 30, 2008, true and correct copies of the United States of America's Unopposed Motion to Unseal Records, with proposed order, and this Certificate of Service were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]
U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 28 April 2033~~

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g) 07-01

EXPEDITED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, to unseal the following documents in the above-captioned matter: (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"). The Order provides that the Order and Opinion "are sealed and shall not be disclosed by either party without authorization by this Court." (S)

By this motion, the Government seeks authorization to unseal the Order and Opinion for the limited purpose of discussions with any other communications service provider directed to provide assistance to the Government pursuant to the Protect

Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 2 May 2033

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America Act of 2007, Pub. L. No. 110-95, 121 Stat. 552 (2007) ("Protect America Act"). The Government seeks authorization to discuss the following matters and others that may arise in the course of discussions with such communications service providers: (i) the fact that the Court granted the Government's Motion to Compel Compliance with Directives of the Director of National Intelligence and Attorney General; (ii) the Court's holding that the certifications and directives at issue satisfy the Protect America Act, are consistent with the Fourth Amendment, and are otherwise lawful; (iii) the holding that the immunity provisions of the Protect America Act remain in effect for the duration of the directives; and (iv) the determination that the certifications may be amended and such amendments do not require the issuance of new directives where, as in this case, certain specified conditions are met. ~~(S)~~

In conducting such discussions with other communications service providers, the Government will not provide for inspection or copying the Order and Opinion themselves nor will it disclose the identity of the communication service provider, Yahoo Inc. ("Yahoo"), whose compliance the Government sought to compel. ~~(S)~~

In addition, to facilitate discussions with other communications service providers, the Government requests expeditious consideration of this motion. ~~(S)~~

On April 30, 2008, by telephone and e-mail communications with counsel for Yahoo, the Government sought the consent of Yahoo to the relief sought in this motion.

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As of the filing of this motion, Yahoo has not informed the Government whether Yahoo opposes the motion. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the documents for the limited purpose identified above. A proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America in the above-captioned docket number and, relying upon the facts set forth in the motion, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"), is GRANTED for the limited purpose set forth in the Government's motion. In all other respects, the Order and Opinion shall remain sealed until further order of the Court.

IT IS FURTHER ORDERED that the Government shall not, in its discussions with communications service providers directed to provide assistance under the Protect America Act of 2007, provide for inspection or copying the Order and Opinion or

Derived From: ~~Motion to the USFISC in Docket Number captioned above~~
Declassify on: ~~2 May 2033~~

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identify Yahoo Inc. ("Yahoo") as the communication service provider whose compliance the Government sought to compel.

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

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cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W., Suite 600 East Tower
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Counsel for Yahoo Inc.

Matthew G. Olsen
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Washington, D.C. 20530
Counsel for the United States

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on May 2, 2008, true and correct copies of the United States of America's Expedited Motion to Unseal Records, with proposed order, and this Certificate of Service were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

Respectfully submitted,

[redacted]

National Security Division
U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 2 May 2033~~

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Filed with the
Court Security Officer
Date: 5/2/08
Signature: [redacted]

~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Docket Number 105B(g): 07-01

ORDER

This matter having come before this Court on the motion of the government filed on May 1, 2008, in the above-captioned docket number, and the government also having filed on that date in the above-captioned docket number a notice stating that Yahoo!, Inc. does not oppose such motion,

IT IS HEREBY ORDERED THAT the Order Compelling Compliance with Directives ("Order") and the Memorandum Opinion ("Opinion"), each of which was entered in the above-captioned docket number on April 25, 2008, are unsealed for the limited purpose of allowing discussions of the Order and the Opinion between the government and communications service providers directed to provide assistance under the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552, and

~~SECRET~~

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IT IS FURTHER ORDERED THAT, as described in the motion, the government is not authorized to provide the Order or Opinion to such communications service providers for inspection or copying,[1] or to identify Yahoo!, Inc. as the communications service provider whose compliance the government sought to compel.

ENTERED this 2nd day of May, 2008 in Docket Number 105B(g): 07-01.

REGGIE B. WALTON
Judge, Foreign Intelligence Surveillance Court

[1] Because these communications service providers will not see the Order and Opinion, the Court expects the government to take special care to describe their contents accurately.

I, Karen E. Sutton, Clerk, FISC, certify that this document is a true and correct copy of the original.

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cc:

Marc J. Zwillinger
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Filed with [illegible] 5-6-08, [illegible] [redacted]

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO! INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **Yahoo! Inc.'s Motion for Stay Pending Appeal** **UNDER SEAL**

MARC J. ZWILLINGER
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Counsel for Yahoo! Inc.

May 6, 2008

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INTRODUCTION

Yahoo! hereby moves this Court for a temporary stay of its April 25, 2008 Order compelling Yahoo! to comply wit[redacted] directives issued to Yahoo! pursuant to the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 ("PAA"), pending resolution of Yahoo!'s Petition for Review to the Foreign Intelligence Court of Review, which was filed on May 5, 2008. As this court has already noted, this case is a "complicated matter of first impression."[1] It is also a case of tremendous national importance.[2] As this Court observed in the conclusion of its 98-page Memorandum Opinion, the statute at issue in this litigation represents an attempt by Congress to strike the proper balance between the security of our nation on one hand and the interests protected by the Fourth Amendment to the United States Constitution on the other.[3] Although the Court undoubtedly believes it reached the right result by ruling that the surveillance permitted by the PAA as modified by certain promises made by the government in its certifications and in Section 2.5 of Executive Order 12333 does not offend the Fourth Amendment, this conclusion was neither obvious nor easy, but resulted from "painstaking and complex constitutional and statutory analysis."[4] As part of that analysis, this Court employed a new test for reasonableness under the Fourth Amendment that departs, in material respects, from the reasoning of the two judicial decisions it found most applicable -- *In re Sealed Case*, 310 F.3d 717 (For. Intel. Surv. Ct. Rev. 2002) and *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

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[1] Memorandum Opinion, April 25, 2008 ("Mem. Op.") at 3.

[2] As demonstrated by the government's recent flurry of motions to unseal, this case is being tracked by both houses of Congress (and the Administration), and the government is also seeking to use the Court's opinion to persuade other providers to comply with the PAA without bringing any further legal challenges.

[3] Mem. Op. at 97.

[4] *Id.* at 97.

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The new four-factor analysis employed by the Court borrows aspects from both decisions but eschews certain factors, such as prior judicial review, that were important to the Foreign Intelligence Surveillance Court of Review's ("FISCR" or "Court of Review") analysis in *In re Sealed Case*, which is the lone binding precedent on this Court.[5] This one facet of the 98-page opinion alone is sufficient to raise a substantial question as to whether the FISCR will agree with this Court's analysis.

In addition, without a stay, United States persons' whose communications may be intercepted under the PAA will suffer irreparable injury if the decision is later reversed by the FISCR. At the core of the litigation is the question of whether the government is permitted, under the Fourth Amendment of the United States Constitution, to examine the private communications of United States persons without a warrant. The FISC has now ruled that the government is entitled to examine these communications. Once government officials have gained access to the communications, the Fourth Amendment rights of the United States persons will be irreversibly lost.

These two strong factors -- likelihood of success on the merits and irreparable harm -- combined with the fact that the issuance of a temporary stay will not cause substantial harm to other parties and will further the public interest, indicate that a stay pending a ruling of the FISCR on Yahoo!'s Petition for Review is appropriate. Such a stay is necessary to preserve the status quo until Yahoo!'s appeal can be heard. Despite the "weighty concerns" at the core of this litigation,[6] the government has made clear that it intends to consider contempt proceedings against Yahoo! if it fails to comply with this Court's Order, *even while this motion for stay is*

[5] *See* Mem. Op. at 57, 72.

[6] *Id.* at 71.

pending.[7] Although Yahoo! believes that contempt proceedings are inappropriate and unwarranted when a motion to stay is pending,[8] the government has not agreed, making guidance from this Court even more essential.

ARGUMENT

Federal courts generally have the power to stay a judgment granting an injunction while an appeal of that judgment is pending. *See Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983). A party seeking a stay of a judgment pending appeal must establish four elements:

> (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay. *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003).

These elements must be applied flexibly, such that if a party makes a particularly strong showing on one or more of the requirements, a court may grant a stay despite a weaker showing on one of the other requirements. *See McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (holding, in

[7] *See* Ex. A, Letter from J. Rowan to M. Zwillinger dated May 5, 2008; Ex. B, Letter from M. Zwillinger to J. Rowan dated May 5, 2008; Ex. C, Letter from M. Olsen to M. Zwillinger dated May 5, 2008; Ex. D., Letter from M. Zwillinger to M. Olsen dated May 6, 2008.

[8] In *Clemente v. United States*, 766 F.2d 1358, 1367 (9th Cir. 1985), the court held that "to find a defendant guilty of 'willful and deliberate defiance of the court's order,' when a stay has been immediately sought would render meaningless the whole process by which parties invoke the power of the courts to defer the effect of their judgments. The Supreme Court has recognized that 'willfulness' may be qualified 'by a concurrent attempt on defendants' part to challenge the order by motion to vacate or other appropriate procedures.' Appellant's motion to stay was an 'appropriate procedure.' Accordingly, we vacate the judgment of contempt." *Id., citing United States v. United Mine Workers*, 330 U.S. 258, 303 (1947). *See also General Teamsters Union Local No. 439 v Sunrise Sanitation Services, Inc*, 2006 WL 2091947 (E.D. Cal. 2006) ("Federal Rule of Civil Procedure 62(c) explicitly affords the losing party an opportunity to seek a stay pending appeal. This rule would be meaningless if, as here, parties could be held in contempt before the trial court was given an opportunity to consider such motions."). Here, Yahoo!'s Motion for a Stay Pending Appeal was filed within 24 hours after the filing of its Petition for Review, and one day after the service of the Court's Memorandum Opinion. This is not a case of either willful or deliberate defiance of the Court's Order. In fact, Yahoo! has taken appropriate steps to be prepared to comply with the Order should the stay be denied.

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the context of reviewing a preliminary injunction in which it applied the same standards, that "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak"). While there is no binding precedent indicating that the test is the same in this context, there are also no compelling reasons why these factors should not apply. In this case, Yahoo! can make a sufficient showing on all four elements and given the complex constitutional issues at stake, Yahoo! has an especially strong case on likelihood of success on the merits and irreparable injury.

I. YAHOO! HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

As the Court itself confirmed in its opinion, the issues of constitutional law that govern this case are complex and not easily resolved. Never before has the constitutionality of the PAA been considered by any court. Although this Court surely believes that its detailed constitutional analysis is sound, this outcome could hardly be free from doubt. This is especially true with regard to the issue at the heart of Yahoo!'s Petition for Review; whether this Court erred when it determined that some of the reasonableness factors invoked by the FISCR in its decision in *In Re Sealed Case* are not appropriate or compelling factors in measuring the reasonableness of surveillance conducted pursuant to the PAA.

The Court of Review in *In re Sealed Case* identified six safeguards imposed by FISA that, when combined, satisfy the Fourth Amendment's "reasonableness" requirement. Those safeguards are:

- "prior judicial scrutiny" of the surveillance;
- "probable cause that the target is a foreign power or an agent of a foreign power;"
- a certification "approved by the Attorney General or the Attorney General's deputy" to "designate the type of foreign intelligence information being sought, and to certify that the information sought is foreign intelligence information;"

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- "probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent;"
- "a 'necessity' provision, which requires the court to find that the information sought is not available through normal investigative procedures;" and
- "minimization of what is acquired, retained and disseminated."

In re Sealed Case, at 738-741.

When Congress enacted the PAA, it did not merely modify the safeguards relevant to FISA's compliance with the Fourth Amendment, it essentially eliminated half (three out of six) of the safeguards. The safeguards that Congress eliminated — prior judicial scrutiny, probable cause to believe that a facility is being used or about to be used by an agent of a foreign power, and necessity — could be viewed by the FISCR as fundamental to the Fourth Amendment's protections against unreasonable search and seizure. As this Court recognized:

> It is not clear from the FISCR opinion how much importance the Court attached to each of the above-described factors. For that reason, it is difficult to discern what effect the modification or removal of one of the factors would have on the overall determination of reasonableness. Nor is there clear guidance on how the requirements of reasonableness might vary for targets who are United States persons [remainder of sentence redacted]. Mem. Op. at 77.

Given that frank assessment, it is quite likely that the FISCR may reach a different conclusion as to the effect of the modification or removal of the factors, especially "prior judicial scrutiny."

Prior judicial scrutiny was the FISA safeguard that the FISCR discussed first and most prominently in *In re Sealed Case,* and this safeguard has long been a cornerstone of the Supreme Court's Fourth Amendment jurisprudence.[9] In that case, the FISCR observed that "[w]ith limited exceptions not at issue here, both Title III and FISA require prior judicial scrutiny of an application for an order authorizing electronic surveillance." *Id.* at 738. The FISCR specifically

[9] *See* 310 F.3d at 738 (discussing *Dalia v. United States*, 441 U.S. 238, 255 (1979)).

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pointed to 50 U.S.C. § 1805, which in subsection (a) requires that a FISA "judge . . . enter an ex parte order" as a prerequisite to "electronic surveillance."

Although this Court acknowledged that it is bound by the holding in *In Re Sealed Case*, it went on to employ a reasonableness analysis that did not include this "critical element" of the FISCR's reasonableness assessment in that case:

> However, given that the FISCR highlighted prior judicial review as one of the three essential requirements of the Fourth Amendment Warrant Clause, **it seems apparent that the FISCR considered this to be a critical element in its reasonableness assessment.** (Mem. Op. at 73) (emphasis added).
>
> * * * *
>
> This Court find the reasoning of the District Court [in *Bin Laden*] persuasive and therefore accepts as a general principle, that prior judicial approval of an acquisition of foreign intelligence information targeted against a United States person abroad **is not an essential element for a finding of reasonableness under the Fourth Amendment**. (*Id.* at 83-84) (emphasis added).

As a result, on this factor alone, there is a substantial likelihood that the Court of Review will come to a different conclusion with regard to the factors that should be employed to evaluate the constitutionality of the surveillance authorized by the PAA.

Second, in passing the PAA, Congress eliminated the requirement for "probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent." This requirement, as set forth in FISA in 50 U.S.C. § 1805(a)(3)(B), was part of the FISCR's determination of reasonableness in *In re Sealed Case*.[10] But there is no analogous requirement in the PAA. Indeed, the surveillance need not be directed at any specific facility or place at all. In devising its new reasonableness test, this Court substantially discounted this factor, finding that "in the overseas context, there is less of a need to require a prior showing of probable cause to believe that a properly targeted individual is using

[10] *See* 310 F.3d at 740.

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or is about to use a specific targeted facility."[11] But it is by no means clear why this would be the case. If the government surveils the wrong yahoo.com email account, it is quite likely that the account will belong to a U.S. person, not a non-United States person.[12]

Finally, in passing the PAA, Congress removed any "'necessity' provision, which requires the court to find that the information sought is not available through normal investigative procedures." 310 F.3d at 740. For standard FISA Court Orders, this requirement is set forth in 50 U.S.C. § 1804(a)(7)(E)(ii). The PAA, on the other hand, contains no such requirement. *See, generally,* 50 U.S.C. § 1805b. It does not require the government to even certify in the directive that "the information sought is not available through normal investigative procedures," much less submit such a certification to a court for prior judicial consideration. This Court concluded that necessity is not an essential factor to the reasonableness determination in this case. While this conclusion may be reasonable on its face, "necessity' is the third of the six reasonableness factors cited in *In re Sealed Case* that this Court excluded from its reasonableness analysis.

While the Court may ultimately be correct that the FISCR would agree that the modified analysis used here meets the Constitutional standards of the Fourth Amendment, it is indisputable that this Court's reasoning differs materially from the reasonableness analysis set forth in *In re Sealed Case*. Given that discrepancy, and the special consideration" that must be afforded to the lone precedent binding this Court, Yahoo! has demonstrated that there is a substantial likelihood that the FISCR might reach a different conclusion.

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[11] *See* Mem. Op. at 85 and n.79.

[12] There is no citation for the Court's conclusion that the erroneous targeting of an email account would be more likely to adversely affect a non-U.S. person and it is unclear why the Court thought this to be the case. *See id.*

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II. THERE WILL BE IRREPARABLE INJURY IF THIS CASE IS NOT STAYED PENDING APPEAL.

If the Court's constitutional analysis is incorrect, without a stay pending appeal, constitutional rights will be violated. The "violation of a constitutional right constitutes irreparable injury." *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C. Cir. 1998). In the First Amendment context, where this issue frequently arises, the United States Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (three-justice plurality opinion); *see also Chaplaincy of Full Gospel Churches*, 454 F.3d at 299 (citing *Elrod* with approval for this proposition). "A statute that threatens freedom of expression to a significant degree by its nature gives rise to irreparable injury." *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999) (Winter, J.).

Searches that violate the Fourth Amendment likewise constitute irreparable injury. As the United States Court of Appeals for the Second Circuit held in *Covino v. Patrissi*, "given the fundamental right involved, namely, the right to be free from unreasonable searches — . . . [the plaintiff] has sufficiently demonstrated for preliminary injunction purposes that he may suffer irreparable harm arising from a possible deprivation of his constitutional rights." 967 F.2d 73, 77 (2d Cir. 1992).[13] This rule applies with full force in cases involving national security. For example, in *Doe v. Gonzales*, an entity with library records challenged 18 U.S.C. § 2709(c), which prohibited it from disclosing that it had received a National Security Letter ("NSL") from the FBI requiring it to disclose information about its patrons. 386 F. Supp. 2d 66, 73 (D. Conn. 2005). The court held that "it is apparent to this court that the loss of Doe's ability to speak out

[13] *See also McDonnell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (holding that "[t]he violation of privacy in being subjected to the searches and tests in question is an irreparable harm"); *Chavez v. United States*, 226 Fed. Appx . 732, 737 (9th Cir. 2007) (holding that allegations of Fourth Amendment violations by "roving patrol operations" on the border between the United States and Mexico established "a likelihood of substantial and immediate irreparable injury").

now on the subject as a NSL recipient is a real and present loss of its First Amendment right to free speech that cannot be remedied." *Id.* The district court entered a preliminary injunction prohibiting enforcement of the "gag" component of the statute, finding that the entity was irreparably harmed by the temporary deprivation of its First Amendment right to free speech. *Id.*

Here, the injury could be particularly severe because the violation of constitutional rights is permanent rather than temporary. This Court has already acknowledged that "extremely sensitive, personal information could be acquired through the directives, akin to electronic eavesdropping of telephone conversations."[14] Once the communications at issue are disclosed, they cannot once again be secreted and their contents cannot be removed from the minds of the government officials that have reviewed them. In this regard, this case is similar to *United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003). There, the United States Court of Appeals for the D.C. Circuit considered whether to stay a district court order requiring a defendant to produce a memorandum prepared by counsel. The Court held that the defendant would be irreparably injured by disclosure of the memorandum because the damage done to the defendants' rights under the attorney-client privilege could not be undone. *See id.* at 621. In addition, the Court noted that the harm of disclosure was increased by the danger that "the attorneys for the United States would be able to use the [attorney-prepared] Memorandum to pursue new leads on discovery and witness questioning." *Id.* The same danger is present if Yahoo! is compelled to disclose its customers' communications, because the violation of rights under the Fourth Amendment is not temporary and cannot be undone. Moreover, the detrimental effect of that violation could be magnified as the government uses the disclosed communications as the basis for further investigations.

[14] Mem. Op. at 71.

III. A STAY PENDING APPEAL SHOULD NOT CAUSE SUCH SUBSTANTIAL HARM TO THE GOVERNMENT TO JUSTIFY DENYING A STAY.

Yahoo! acknowledges that the government has a compelling, interest at stake – the need to obtain foreign intelligence information to protect national security. But, this litigation has been pending since November 21, 2007. The government has been asking this Court for expedited decision-making for over five months. Despite these repeated entreaties, this Court believed it appropriate to engage in detailed statutory and constitutional analysis before ruling on the issues. The government exigencies were not deemed so significant as to give the legal analysis short shrift. The same considerations should be given to allow the FISCR time to review the weighty issues at stake.

Any harm incurred by the government from a stay pending appeal does not exceed the harm resulting from the potential violation of constitutional rights. This motion does not require the Court to weigh the constitutional rights of Yahoo!'s customers against the government's need for the contents of the communications at issue. Rather, it requires the Court to weight the constitutional rights of Yahoo!s' customers against a further delay in the government's access to the communications at issue. Although this delay may cause harm to the government, there is no reason to believe that the harm will be substantial enough to justify the denial of a stay.

To the contrary, any argument by the government that it will be substantially harmed by delay in obtaining the contents of the communications it seeks is belied by the government's actions in this case. During the five-month duration of the litigation, the government has had the option of seeking an order authorizing "emergency employment of electronic surveillance" pursuant to 50 U.S.C. § 1805(f). [redacted] This procedure continues to be available for emergencies that may arise while the stay is in effect. As a result, any harm to the government from a modest delay

while the Court of Review considers the important issues raised by this case does not outweigh risking an irreparable violation of the constitutional rights of United States Persons.

IV. ISSUANCE OF A STAY PENDING APPEAL IS IN THE PUBLIC INTEREST.

The threat posed by terrorism is a serious one, at the highest end of the scale. But the public interest in protecting the freedoms established in the Bill of Rights is equally unassailable. As the United States Supreme Court held in *United States v. Raines*, "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights." 362 U.S. 17, 27 (1960). In *Almeida-Sanchez v. United States*, the Supreme Court considered the public's interest in a similar case involving a conflict between the Constitution and the government's efforts to secure the borders of the United States:

> It is not enough to argue, as does the government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. 413 U.S. 266, 273-274 (1973).

The Supreme Court explained why the Fourth Amendment is so vital to the public interest, even in the face of assertions of national security, by quoting with approval an earlier dissenting opinion written by Justice Jackson shortly after his return from the Nuremberg Trials:

> These (Fourth Amendment Rights), I protest, are not mere second-class rights but belong in the catalog of indipensable [sic] freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. *Id.* at 274 (quoting with approval *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

If there is a substantial likelihood of a different result on appeal, federal courts have consistently found that the public interest lies with the protection of Fourth Amendment rights despite arguments by the government regarding the needs of law enforcement. *See, e.g., Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1071 (7th Cir. 1976) ("the public interest is served by

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the preliminary injunction, for otherwise the dragnet practices violating the Fourth Amendment rights of plaintiffs could continue unabated"); *Platte v. Thomas Township*, 504 F. Supp.2d 227, 247 (E.D. Mich. 2007) ("it is not in the public interest to perpetuate the unconstitutional application of a statute"); *Dearmore v. City of Garland*, 400 F. Supp.2d 894, 905-906 (N.D. Tex. 2005) (granting preliminary injunction against enforcement of an Ordinance that provided for unconstitutional searches and holding that "enjoining the enforcement of an unconstitutional provision of the Ordinance promotes rather than disserves the public interest"); *Haynes v. Office of the Attorney General Phill Kline*, 298 F. Supp.2d 1154, 1160 (D. Kan. 2003) (enjoining search of plaintiff's computer that would violate Fourth Amendment and holding that "the relief granted by the court will promote the public interest").[15]

Given the substantial weighty public interest on both sides of the question, a slightly greater weight has to be given to the Constitutional interests because the relief sought is only temporary and necessary to protect the status quo. Compared with a potential irreparable violation of the Constitutional rights of U.S. citizens, an additional delay to afford the Court of Review an opportunity to ensure that the government's searches are consistent with the United States Constitution is in the public's interest.

CONCLUSION

Congress clearly intended that this Court not be the final arbiter on the question of the constitutionality of the PAA.[16] Given the (1) complex constitutional issues at stake; (2) the

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[15] *See also Doe v. LaDue*, 514 F. Supp.2d 1131, 1138 (D. Minn. 2007). In *LaDue*, the court found that despite the government's interest in preventing recidivism by sex offenders, there was an alternate constitutional means to accomplish the same purpose while a preliminary injunction was pending. Therefore, the greater public interest was in issuing an injunction to protect plaintiff's constitutional rights against unreasonable searches under the Fourth Amendment.

[16] *See* 50 U.S.C. §1805b(3)(i) ("The government or a person receiving a directive reviewed pursuant to subsection(h) of this section may file a petition with the Court of Review established under section 1803(b) of this title for review of the decision issued pursuant to subsection(h) of

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indisputable fact that the analysis employed by this Court differs from the analysis employed by the Court of Review in *In Re Sealed Case*; and, (3) the irreparable harm that would occur if this Court's reasonable analysis were overruled by the FISCR, Yahoo! respectfully requests that the Court grant Yahoo!'s Motion for Stay Pending Appeal.

DATED: May 6, 2008

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this section not later than 7 days after the issuance of such decision. . . Such court of review shall have jurisdiction to consider such petitions and shall provide for the record a written statement of the reasons for its decision. On petition for a writ of certiorari by the government or any person receiving such directive, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.").

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th Day of May 2008, I provided a true and correct copy of **Yahoo! Inc.'s Motion for Stay Pending Appeal** (the "Motion") to an Alternate Court Security Officer, who has informed me that s/he will deliver one copy of the Briefing to the Court for filing, and a second copy (without exhibits) to the:

United States Department of Justice
National Security Division
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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

2008 MAY -9 PM 12:57
KAREN SUTTON
CLERK

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, to unseal the following documents in the above-captioned matter: (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"). The Order provides that the Order and Opinion "are sealed and shall not be disclosed by either party without authorization by this Court." ~~(S)~~

The Government previously filed an Expedited Motion to Unseal Records – the Order and Opinion – for the limited purpose of discussions with other communications service providers directed to provide assistance to the Government pursuant to the

~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason: 1.4 (c)~~
~~Declassify on: 9 May 2033~~

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Protect America Act of 2007, Pub. L. No. 110-95, 121 Stat. 552 (2007). By Order dated May 2, 2008, the Court granted the Government's Expedited Motion to Unseal. ~~(S)~~

In furtherance of those discussions, the Government seeks authorization to provide the Order and Opinion to such communications service providers for the limited purpose of allowing them to read, but not retain, redacted versions of the Order and Opinion. The Government, accordingly, moves to unseal the Order and Opinion. In providing such communications service providers access to the Order and Opinion for their review, the Government will redact from the Order and Opinion: (i) the name of Yahoo Inc. ("Yahoo"), (ii) all other references that would disclose the identity of Yahoo, and (iii) all information that was redacted from the versions of the Order and Opinion served on counsel for Yahoo, specifically all information at the Top Secret/COMINT level and all information for which Yahoo, its counsel and other communications service providers have no need-to-know. In addition, for each communication service provider representative who reads the redacted Order and Opinion, the Government will require that the representative sign a non-disclosure agreement prior to his or her review. ~~(S)~~

On May 9, 2008, counsel for Yahoo informed the Government that Yahoo does not oppose the relief sought in this motion, provided that the Government redacts the Order and Opinion as described above and requires each communication service

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provider representative who reads the redacted Order and Opinion to sign a non-disclosure agreement prior to his or her review. ~~(S)~~

WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the documents for the limited purpose identified above. A proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America in the above-captioned docket number and, relying upon the facts set forth in the motion, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"), is GRANTED for the limited purpose set forth in the Government's motion. In all other respects, the Order and Opinion shall remain sealed until further order of the Court.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Order and Opinion, redact the Order and Opinion in the manner described in the Government's motion and require that each

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 9 May 2033~~

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communication service provider representative who reads the redacted Order and Opinion sign a non-disclosure agreement prior to his or her review

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

cc:

Marc J. Zwillinger
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1301 K Street, N.W., Suite 600 East Tower
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Counsel for Yahoo Inc.

Matthew G. Olsen
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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on May 9, 2008, true and correct copies of the United States of America's Unopposed Motion to Unseal Records, with proposed order, and this Certificate of Service were submitted, by hand delivery, to [redacted] a Court-designated alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. ~~(S)~~

[redacted]
National Security Division
U.S. Department of Justice

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 9 May 2033~~

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

UNOPPOSED MOTION TO UNSEAL RECORDS (U)

The United States of America, by and through the undersigned Department of Justice attorneys, hereby moves this Court, pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, and Rule 7(b) of the Rules of Procedure of this Court, to unseal the following documents in the above-captioned matter: (1) Yahoo!, Inc.'s ("Yahoo") Motion for Stay Pending Appeal (filed May 6, 2008); (2) Government's Motion for an Order of Civil Contempt (filed May 9, 2008); (3) Combined Memorandum in Opposition to Yahoo's Motion for Stay Pending Appeal and in Support of Government's Motion for an Order of Civil Contempt (filed May 9, 2008); (4) Motion for Leave to File Classified Declaration for the Court's Ex Parte and In Camera Review, with attached classified declaration (filed May 9, 2008); (5) the Court's order (entered

~~Classified by:~~	~~Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~
~~Reason:~~	~~1.4 (c)~~
~~Declassify on:~~	~~12 May 2033~~

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May 9, 2008) ("May 9, 2008 Order"); and (6) Yahoo's report on the status of its compliance with the Court's April 25, 2008 Order (to be filed with the Court Security Officer no later than 5:00 p.m. on May 14, 2008). The May 9, 2008 Order provides that it "is sealed and shall not be disclosed by either party without authorization by this Court." In addition, the Government assumes that the documents described above are records of the Court pursuant to Rule 7(b). ~~(S)~~

Pursuant to Section 4 of the Protect America Act, the Attorney General on a semiannual basis must inform specified congressional committees of "incidents of noncompliance by a specified person to whom the Attorney General and Director of National Intelligence issue a directive." Protect America Act of 2007, Pub. L. No. 110-95, § 4(1)(B), 121 Stat. 552, 555-56 (2007). In connection with this requirement, staff members of the Select Committee on Intelligence of the Senate and the Committee on the Judiciary of the Senate were briefed on the status of the decision of Yahoo not to comply with directives issued under the Protect America Act. Staff members of the Select Committee on Intelligence of the Senate and Committee on the Judiciary of the Senate since have requested access to briefing in connection with the consideration of proposed legislation to amend the Foreign Intelligence Surveillance Act of 1978. ~~(S)~~

In response to these requests, the Government has previously moved the Court to unseal certain pleadings filed by the Government and Yahoo and to unseal the Order

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and Opinion issued by the Court on April 25, 2008. The Court approved the unsealing of those documents for disclosure to the specified congressional committees by orders dated January 10 and 17, 2008, and April 22 and 30, 2008. ~~(S)~~

The Government now intends to provide copies of the above-described motions, memorandum, May 9, 2008 Order, and report to the specified congressional committees. The Government, accordingly, moves to unseal the above-described documents. ~~(S)~~

On May 13, 2008, counsel for Yahoo informed the Government that Yahoo does not oppose the relief sought provided that: (i) the above-described documents are unsealed for the limited purpose of allowing the Government to disclose and submit them to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives; and (ii) prior to such disclosure, the Government will redact from the above-described documents the name of Yahoo and all other references that would disclose the identity of Yahoo. ~~(S)~~

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WHEREFORE the United States of America, by counsel, respectfully requests that the Court unseal the documents identified above. An unopposed proposed order accompanies this motion. ~~(S)~~

Respectfully submitted,

Matthew G. Olsen
Deputy Assistant Attorney General
National Security Division
United States Department of Justice

[redacted]
National Security Division
United States Department of Justice

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) Yahoo!, Inc.'s ("Yahoo") Motion for Stay Pending Appeal (filed May 6, 2008), (2) Government's Motion for an Order of Civil Contempt (filed May 9, 2008), (3) Combined Memorandum in Opposition to Yahoo's Motion for Stay Pending Appeal and in Support of Government's Motion for an Order of Civil Contempt (filed May 9, 2008), (4) Motion for Leave to File Classified Declaration for the Court's Ex Parte and In Camera Review, with attached classified declaration (filed May 9, 2008), (5) the Court's order

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(entered May 9, 2008) ("May 9, 2008 Order"), and (6) Yahoo's report on the status of its compliance with the Court's April 25, 2008 Order (to be filed with the Court Security Officer no later than 5:00 p.m. on May 14, 2008), which were or will be filed or issued pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the above-described documents to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the above-described documents shall remain sealed until further order of the Court.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the above-described documents, redact from them the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed ______________________________ Eastern Time
Date Time

____

Judge, United States Foreign
Intelligence Surveillance Court

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cc:

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. (S)	Docket Number: 105B(g)-07-01

CERTIFICATE OF SERVICE (U)

I hereby certify that, on May 13, 2008, true and correct copies of the United States of America's Unopposed Motion to Unseal Records, with proposed order, and this Certificate of Service were submitted, by hand delivery, to a Court-designated Litigation Security Officer or alternate Litigation Security Officer, for delivery to counsel of record for Yahoo Inc. (S)

[redacted]
National Security Division
U.S. Department of Justice

Derived From: Motion to the USFISC in Docket Number captioned above
Declassify on: 12 May 2033

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FILED WITH THE
COURT [redacted]ICER
CSO: [redacted]
DATE: 5/14/08

FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE DIRECTIVES TO YAHOO! INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	**Dkt. No. 105B(G) 07-01** **Yahoo! Inc.'s Unopposed Motion to Transmit the Record to the Foreign Intelligence Surveillance Court of Review** **UNDER SEAL**

Yahoo!, by and through its undersigned counsel, hereby moves this Court pursuant to the Foreign Intelligence Surveillance Act, as amended, and Rule 18 of the Rules of Procedure of this Court, to Transmit the Record in this docket to the Foreign Intelligence Court of Review ("Court of Review').

On May 5, 2008, Yahoo! filed a Petition for Review with the Court of Review, a file-stamped copy of which is attached as Ex. A. The Draft Procedures for Review of Petitions Filed Under Section 105B(h) of the Foreign Intelligence Surveillance Act of 1978 ("Draft Procedures") contain no provisions for the transmission of the record to the Court of Review upon appeal by either party. Section 2 of the Draft Procedures, however, specify that the Rules of Procedure of the Foreign Intelligence Surveillance Court ("Rules of Procedure") apply to all matters before this Court. Rule 18 of the Rules of Procedure specify that where the government files an appeal after the denial of one of its applications, the government must file a motion to transmit the record to the Court of Review. Therefore, it follows that when an appeal, or Petition for Review, is brought by either the government or a provider regarding the enforcement of a

Directive, a motion to transmit the record to the Court of Review must also be filed in connection with the appeal.

Counsel for Yahoo! has spoken with counsel for the government, who has advised that the government does not oppose the instant Motion to Transmit the Record to the Court of Review, provided that the government's non-opposition is without prejudice to any argument that the government may make before the Court of Review with regard to the appropriateness of Yahoo!'s appeal and/or the jurisdiction of the Court.

WHEREFORE Yahoo!, by counsel, respectfully requests that the Court transmit the record in this docket to the Court of Review.

DATED: May 14, 2008

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Approved for public release by the ODNI 20160408

CERTIFICATE OF SERVICE

I hereby certify that on this 14th Day of May 2008, I provided a true and correct copy of **Yahoo! Inc.'s Motion to Transmit Record** (the "Motion") to an Alternate Court Security Officer, who has informed me that s/he will deliver one copy of the Motion to the Court for filing, and a second copy (without Exhibit A, which the government has already received) to the:

United States Department of Justice
National Security Division
950 Pennsylvania Ave., NW
Room 6150
Washington, D.C. 20530

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America in the above-captioned docket number and, relying upon the facts set forth in the motion, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) the Order Compelling Compliance with Directives (dated April 25, 2008) ("Order"); and (2) Memorandum Opinion (dated April 25, 2008) ("Opinion"), is GRANTED for the limited purpose set forth in the Government's motion. In all other respects, the Order and Opinion shall remain sealed until further order of the Court.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the Order and Opinion, redact the Order and Opinion in the manner described in the Government's motion, and ~~require that each~~ shall only provide the redacted Order and Opinion to a communication service DB

~~Derived From: Motion to the USFISC in Docket Number captioned above~~

~~Declassify on: 9 May 2033~~

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provider representative to read if that representative has DB
~~communication service provider representative who reads the redacted Order and~~

signed DB
~~Opinion sign~~ a non-disclosure agreement prior to his or her review.

Signed May 14, 2008 6:15 p.m. Eastern Time
Date Time

Judge, United States Foreign
Intelligence Surveillance Court

cc:

Marc J. Zwillinger
Sonnenschein Nath & Rosenthal LLP
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Counsel for Yahoo Inc.

Matthew G. Olsen
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Washington, D.C. 20530
Counsel for the United States

[redacted]
FISC, certify that this document
is a true and correct [redacted]
the original.

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. ~~(S)~~	Docket Number: 105B(g) 07-01

ORDER

This matter having come before this Court on the motion of the United States of America in the above-captioned docket number and, relying upon the facts set forth in the motion and the statement of the agreement of the parties, it appearing to the Court that the motion should be granted,

IT IS HEREBY ORDERED that the motion of the United States to unseal (1) Yahoo!, Inc.'s ("Yahoo") Motion for Stay Pending Appeal (filed May 6, 2008), (2) Government's Motion for an Order of Civil Contempt (filed May 9, 2008), (3) Combined Memorandum in Opposition to Yahoo's Motion for Stay Pending Appeal and in Support of Government's Motion for an Order of Civil Contempt (filed May 9, 2008), (4) Motion for Leave to File Classified Declaration for the Court's Ex Parte and In Camera Review, with attached classified declaration (filed May 9, 2008), (5) the Court's order

~~Derived From: Motion to the USFISC in Docket Number captioned above~~
~~Declassify on: 12 May 2033~~

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(entered May 9, 2008) ("May 9, 2008 Order"), and (6) Yahoo's report on the status of its compliance with the Court's April 25, 2008 Order (filed May 14, 2008) DB ~~(to be filed with the Court Security Officer no later than 5:00 p.m. on May 14, 2008)~~, which were ~~or will be~~ filed or issued pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, in the above-captioned docket number, is GRANTED for the limited purpose of allowing the Government to disclose and submit the above-described documents to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives. In all other respects, the above-described documents shall remain sealed until further order of the Court.

IT IS FURTHER ORDERED that, based on the agreement of the parties, the Government shall, prior to disclosure of the above-described documents, redact from them the name of Yahoo and all other references that would disclose the identity of Yahoo.

Signed May 14, 2008 6:11 p.m. Eastern Time
Date Time

[signature]

Judge, United States Foreign
Intelligence Surveillance Court

[redacted]
C, certify that this document
is a true and correct copy of
the original. [redacted]

cc:

Marc J. Zwillinger
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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DIRECTIVES TO YAHOO!, INC. PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT ~~(S)~~

Docket Number 105B(G): 07-01

ORDER

The Court having received Yahoo! Inc.'s Unopposed Motion to Transmit the Record to the Foreign Intelligence Surveillance Court of Review,

IT IS HEREBY ORDERED that the motion is GRANTED. The Clerk shall transmit the record under seal and as expeditiously as possible to the Foreign Intelligence Surveillance Court of Review.

IT IS SO ORDERED, this 15th day of May, 2008.

DEE BENSON
Judge, United States Foreign
Intelligence Surveillance Court

[redacted]
FISC, certify that this document is a true and correct copy of the original [redacted]